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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965.

No. 334

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

*Petitioner,*

*against*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

*Petitioner,*

*against*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, National Maritime Union of America, AFL-CIO, prays that a Writ of Certiorari be issued to review the Decrees of the United States Court of Appeals for the Second Circuit, entered in the above entitled cases on April 9, 1965.

* Second Circuit Court of Appeals Docket No. 29067.

** Second Circuit Court of Appeals Docket No. 29068.

## Opinions Below.

The Decisions and Orders of the National Labor Relations Board and Trial Examiner's Decisions, printed as part of the Joint Appendix in the Court below, nine copies of which are submitted herewith, are reported in 147 NLRB No. 144 (1964) and 147 NLRB No. 142 (1964). The Opinion of the United States Court of Appeals for the Second Circuit, printed as Appendix B hereto, is reported in F. 2d (2nd Cir. 1965). The Decrees of the United States Court of Appeals for the Second Circuit are printed as Appendix C hereto.[1]

## Jurisdiction.

The Decrees of the United States Court of Appeals for the Second Circuit were entered on April 9, 1965 (Appendix C). The petition for rehearing was denied on April 13, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

## Questions Presented.

(1) Does the National Labor Relations Board have jurisdiction to convict a labor union of an unfair labor practice where there is no *labor dispute* as defined in the National Labor Relations Act?

(2) Does the National Labor Relations Board have jurisdiction to issue a complaint charging a *secondary* boycott under Section 8(b)(4) of the National Labor Relations Act where there is no dispute with a *primary* employer?

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[1] The conflicting decision of the United States Court of Appeals for the District of Columbia Circuit in *National Maritime Union of America* v. *NLRB*, reported in F. 2d (D. C. Cir. 1965, No. 18789) arising out of the same dispute is printed as Appendix D hereto.

## Statutes Involved.

The statutory provisions involved are the National Labor Relations Act, as amended, Section 2(9), 8(b)(4)(i)(ii)(B) and (D), and 10(f), 29 U. S. C. A. 152(9), 158(b)(4)(i)(ii)(B) and (D), and 160(f), and the Norris-LaGuardia Act, Sections 13(a) and (c), 29 U. S. C. A. 113(a) and (c).

## Statement of the Case.

On June 10, 1963, the SS. *Maximus* arrived in the Port of Philadelphia to load Red Cross supplies destined for Cuba in exchange for survivors of the Bay of Pigs invasion. The vessel recently had been acquired by a newly formed company, Cambridge Carriers, Inc., which had entered into collective bargaining agreements with the National Maritime Union of America (NMU) for its unlicensed personnel and the Brotherhood of Marine Officers (BMO) for its licensed deck and engine room officers.

Prior to the acquisition by Cambridge Carriers, the vessel had been owned by Grace Line, Inc. at which time her licensed marine engineers were represented by the Marine Engineers Beneficial Association (MEBA). Upon the arrival of the *Maximus* in Philadelphia, MEBA immediately commenced picketing the ship in order to force Cambridge Carriers out of business unless it terminated its contract with BMO and signed with MEBA. The unlicensed men aboard the vessel, represented by NMU, were caught in the middle of this dispute and were in danger of losing their jobs if the *Maximus* continued to be immobilized because of the MEBA picketing.

Cambridge Carriers immediately filed unfair labor practice charges against MEBA, but the National Labor Rela-

tions Board refused to issue a complaint on the ground that MEBA members, being licensed officers, were supervisory personnel, and, therefore, outside the coverage of the National Labor Relations Act.

With the vessel immobilized and the unlicensed personnel represented by NMU in danger of losing their jobs, NMU began to picket MEBA engineers wherever they could be found on other ships, protesting the illegal picketing of the *Maximus*. The picket signs stated:

INFORMATIONAL PICKETING
MEBA ENGINEERS
INTERFERE WITH
EMPLOYER WHO
LAWFULLY RECOGNIZES N. M. U.

This publicity effort was directed to MEBA members in the Ports of Philadelphia, New Orleans, and in the Houston and Galveston areas to the end that they would call upon their union leadership to stop the picketing of the *Maximus* which, while obviously improper, was beyond the reach of the National Labor Relations Board.

In Philadelphia, the NMU picketing commenced on June 14, 1963, at Pier 27 where MEBA engineers were manning the Weyerhaeuser vessel, *George Long*. On June 19, 1963, with MEBA still refusing to discontinue its illegal picketing of the *Maximus*, the NMU picketing was extended to the MEBA engineers aboard the S.S. *Portmar* of Calmar Steamship Company.[2]

The NMU picket lines consisted of two men parading about 18 feet from the pier entrance on Delaware Avenue. The picketing was peaceful and conducted in a large area with approximately 30 feet between each man and all this

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[2] It should be noted that both the National Labor Relations Board and the Court below conceded that NMU's objective in its picketing was legal and proper.

activity took place on the public streets. At no time, either before, during or after the NMU picketing, did any representative of NMU make any requests or demands of any kind upon Weyerhaeuser, Calmar or Nacirema Operating Company, the stevedore employed by those companies. The NMU picketing was directed solely to the MEBA engineers.

In Houston, on June 17, 1963, NMU picketed MEBA engineers on the S.S. *Del Campo* at the Long Reach docks. In Galveston, NMU picketed MEBA engineers on the S.S. *Del Alba*. As in Philadelphia, the picketing was at all times peaceful and, at no time, did NMU make any demands of any kind whatsoever on any employer. Finally, on June 20th six days after NMU began its defensive picketing, MEBA stopped its illegal picketing of the *Maximus* and NMU terminated its picketing of the MEBA engineers.

Thereafter, although the National Labor Relations Board had considered itself unable to protect NMU from the illegal picketing by MEBA, it nevertheless issued complaints against NMU, alleging that the NMU picketing constituted a secondary boycott under Section 8(b)(4)(i)(ii)(B) of the Act. The trial examiners in the Philadelphia and Houston-Galveston cases ignored the fact that the NMU picketing was not related to a "labor dispute" as defined in the Act, and found NMU guilty of a secondary boycott. The National Labor Relations Board affirmed, and in so doing, expressly refused to follow the holding of the Court of Appeals for the Fourth Circuit in *NLRB* v. *International Longshoremen's Association (Tulse Hill)*, 332 F.2d 992 (1964), that a labor dispute as defined in Section 2(9) of the N. L. R. A., which does not include a dispute between two unions, is an indispensable prerequisite to Board jurisdiction. The Board also specifically refused to follow the decision of the Court of Appeals for the Second Circuit in *Douds* v. *International Longshoremen's Associa-*

*tion*, 224 F.2d 455, *cert. denied*, 350 U. S. 873 (1955), that a charge of secondary boycott cannot be sustained in the absence of a dispute with a primary employer.

On petition for review, the Second Circuit Court of Appeals affirmed, despite the fact that a "labor dispute" as defined in the N. L. R. A. was lacking. On this point, the Court below, for its definition of a "labor dispute," relied on cases interpreting the Norris-LaGuardia Act, which, unlike the National Labor Relations Act, specifically extends to disputes solely between two unions without regard to whether terms or conditions of employment are involved. In so holding, the Court below came into direct conflict with and refused to follow the decision of the Court of Appeals for the Fourth Circuit in *NLRB* vs. *International Longshoremen's Association (Tulse Hill), supra.* The Court below also held that a dispute with a primary employer was not a prerequisite to a secondary boycott charge, thereby coming into conflict with the decision in *Douds* v. *International Longshoremen's Association, supra.* In an effort to find some basis for bringing the case within Section 8(b)(4) of the Act, the Court viewed the controversy as a jurisdictional dispute, even though no charges were filed under the jurisdictional dispute provisions of the Act, and without any apparent realization that the NMU picketing could not possibly be considered part of a jurisdictional dispute as NMU and MEBA were not competing for the same jobs.

In a related case, dealing with the NMU picketing of the MEBA engineers in New Orleans, the trial examiner, on the authority of *Douds* vs. *International Longshoremen's Association, supra*, found in favor of NMU but was reversed by the Board which refused to follow the *Douds* decision. The Court of Appeals for the District of Columbia Circuit, in affirming the Board, like the Second Circuit,

refused to follow the decision of the Court of Appeals for the Fourth Circuit in *NLRB* vs. *International Longshoremen's Association (Tulse Hill), supra,* but on the different ground that it was not necessary that there be a "labor dispute" for the Board to exercise jurisdiction. Thus, the Court below and the District of Columbia Circuit are in conflict with each other on the question of the necessity for the existence of a "labor dispute" and both are in conflict with the Fourth Circuit as to the definition of a "labor dispute." Both also are in conflict with the decision *Douds* vs. *International Longshoremen's Association, supra.*

Petitioner herein seeks review of the decision of the Court below on two basic grounds: first, because of the conflict with the decision of the Court of Appeals for the Fourth Circuit in *NLRB* vs. *International Longshoremen's Association (Tulse Hill), supra,* which held that a "labor dispute" within the meaning of the N. L. R. A. is an indispensable prerequisite to an unfair labor practice charge; and, second, because of the conflict with the decision of the Second Circuit Court of Appeals in *Douds* vs. *International Longshoremen's Association, supra,* holding that the absence of a dispute with a primary employer effectively bars any charge of secondary boycott under Section 8(b)(4).

## REASONS FOR GRANTING THE WRIT.

### I.

**The Court below, in conflict with the decision of the Court of Appeals for the Fourth Circuit in *NLRB* v. *International Longshoremen's Association (Tulse Hill)*, 332 F. 2d 992, applied the Norris-LaGuardia Act definition of a labor dispute in a case arising under the N. L. R. A. thus expanding the Labor Board's jurisdiction to disputes other than those involving terms and conditions of employment. The decision below also is in conflict with the holding of the Court of Appeals for the District of Columbia Circuit in *National Maritime Union* v. *NLRB*, F. 2d , that no labor dispute whatever is necessary for the Board to exercise jurisdiction over an unfair labor charge under Section 8(b)(4) of the N. L. R. A.**

In *NLRB* v. *International Longshoremen's Association (Tulse Hill)*, 332 F. 2d 992 (1964), the Court of Appeals for the Fourth Circuit flatly rejected an attempt by the National Labor Relations Board to extend its jurisdiction to controversies which did not constitute labor disputes as defined in Section 2(9) of the National Labor Relations Act. There, the International Longshoremen's Association had refused to refer longshoremen to Maryland Ship Ceiling Co., a stevedore, for work aboard the *Tulse Hill*, a vessel which had been engaged in trade with Communist Cuba. In reversing the Board's assumption of jurisdiction, the Court of Appeals stated (at p. 995):

> "The more important attack on the Board's jurisdiction is that we have here no 'labor dispute' as the law defines it. Beyond doubt the National Labor

Relations Act, as amended, is designed 'to regulate the conduct of people engaged in labor disputes.' Marine Cooks & Stewards *v.* Panama S.S. Co., 362 U. S. 365, 372, 45 LRRM 3118 (1960). The Act is replete with references to the term 'labor dispute' and Section 2(9) provides a definition of this phrase.

"'(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relations of employer and employee.'' 29 U. S. C. A. §152(9).

"The Act has been interpreted as conferring Board jurisdiction over a variety of labor matters, *but there can be no jurisdiction where the complaint presents a controversy unrelated to the resolution of a 'labor dispute' as defined.* We think that this is the case here." (Emphasis supplied.)

In the instant cases, the evidence is clear beyond any doubt, and the Board so found, that NMU did not have a dispute with any employer. Moreover, NMU was not engaged in any controversy concerning terms or conditions of employment and was not seeking to gain recognition as the representative of any employees. The sole purpose of the NMU picketing was to bring a message to MEBA members about what their union was doing to the *Maximus* and the effect of this picketing on the NMU crew. This action by NMU did not fall within the Section 2(9) definition of a labor dispute. Accordingly, the Court's reasoning in the *Tulse Hill* case, *supra,* is equally applicable here (332 F. 2d 996):

"The point relied on by ILA is not merely the absence of a labor dispute with a primary employer, as the Board's opinion states. The point is rather the absence of any 'labor dispute' as the statute

> defines it, namely, a dispute concerning 'terms or conditions of employment' . . . The existence of a 'labor dispute', *the indispensable prerequisite to jurisdiction, is simply assumed by the Board. Implied in the Board's pronouncement is the notion that whenever a union calls a work stoppage or refuses to supply labor there is a 'labor dispute'.* We cannot accept this view." (Emphasis supplied.)

The Board considered three cases involving the NMU picketing of the MEBA engineers. Its treatment of the *Tulse Hill* decision in each of the three cases shows a remarkable pattern of inconsistency. In the Philadelphia case, 147 NLRB No. 14478, the Board simply refused to follow the Fourth Circuit's views "until such time as the issue is finally resolved by the Supreme Court" (J. App., Case No. 29067, page 2, Note 3). In the Houston-Galveston decision, 147 NLRB No. 142, the Board attempted to bridge the gap in its statutory jurisdiction by merely noting there was an "underlying labor dispute" involved (J. App. Case No. 29068, Page 5, Note 9), although here too the Board apparently recognized that this "underlying" dispute did not fit the Section 2(9) definition. In the New Orleans decision, 147 NLRB No. 147 (1964), the Board went so far as to claim that the Fourth Circuit denied enforcement of the order in the *Tulse Hill* case "on other grounds" than the jurisdictional issue, a statement which is incomprehensible in view of the clear language of the opinion previously cited.

When the case reached the Court of Appeals, the Board's General Counsel abandoned these three conflicting views and, instead, argued that since the instant picketing would be a labor dispute for purposes of the Norris-LaGuardia Act, 29 U. S. C. §101, *et seq.*, it should also be considered a labor dispute under the National Labor Relations Act, 29

U. S. C. A. §140, *et seq.*[3] To support this contention, counsel cited the similarity in language between Section 2(9) of the National Labor Relations Act and Section 13(c) of the Norris-LaGuardia Act. Significantly, however, counsel for the Board completely ignored Section 13(a)[4] of the Norris-LaGuardia Act, which specifically enlarged the scope of labor disputes thereby extending the ban against injunctions to disputes between labor unions alone, without regard to whether the dispute involves terms or conditions of employment. The N. L. R. A. has no comparable provision, but is specifically limited to labor disputes involving "terms and conditions of employment."

In spite of the Norris-LaGuardia Act's very broad language specifically incorporating the type of dispute involved here, the Court below held that Section 13(a),

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[3] In support of this argument, reliance was placed on *Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91 (1940). However, a review of the facts in *Milk Wagon Drivers Union* reveals that it involved a protest by milk delivery men against their employer's adoption of a new distribution system which was eliminating their jobs and thus clearly was a dispute over "terms or conditions of employment." *Cf. Local 107, etc. and Safeway Stores, Inc.*, 134 NLRB No. 130 (1961). *Milk Wagon Drivers Union* involved a dispute with an employer. The instant case does not.

[4] Section 13(a) "When used in this chapter, and for the purposes of this chapter—(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) *between one or more employees or associations of employees and one or more employees or associations of employees;* or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) or 'persons participating or interested' therein (as defined in this section)." (Emphasis supplied.)

rather than broadening the scope of the Norris-LaGuardia Act, operated "to *limit* the cases which can be held to 'involve or grow out of a labor dispute.' " Thus, if the lower courts decision is allowed to stand the absurd result follows that the scope of the Board's jurisdiction, and potential injunctive power, will be even broader than the class of cases embraced by the Norris-LaGuardia Act, a result which is in direct conflict with the decision of this Court in *New Negro Alliance v. Sanitary Grocery Co.*, 303 U. S. 552 (1938). *New Negro Alliance* involved picketing by a civil rights organization to protest racial barriers in hiring. In holding that the Norris-LaGuardia Act precluded the federal courts from enjoining such picketing, this Court stated:

> "In quoting the clauses of §13 we have omitted those that deal with disputes between employers and employees and disputes between associations of persons or persons engaged in a particular trade or craft, and employers in the same industry. *It is to be noted, however, that the inclusion in the definitions of such disputes, and the persons interested in them, serves to emphasize the fact that the quoted portions were intended to embrace controversies other than those between employers and employees;* between labor unions seeking to represent employees and employers; and between persons seeking employment and employers." (Emphasis supplied.)

It is significant that while the Court below relied upon the Norris-LaGuardia Act to bring the instant case within the orbit of a labor dispute, the Court of Appeals for the District of Columbia Circuit, in the related case involving this same dispute, rejected this argument and took the conflicting position that the existence of a labor dispute was not even necessary to a charge under Section 8(b)(4) of

the Act. As a result, there is now a conflict between the Second, Fourth and District of Columbia Circuits on the questions of whether the existence of a labor dispute is necessary for Board jurisdiction and on the definition of a labor dispute. Both these questions are of fundamental importance in the interpretation and administration of the National Labor Relations Act. Accordingly, Certiorari should be granted so that these conflicts may be resolved.

## II.

**The failure of the Court below, and the refusal of the District of Columbia Court of Appeals in the related case, to follow the decision of the Second Circuit in *Douds* v. *International Longshoremen's Association*, 224 F. 2d 455, holding there can be no secondary boycott in the absence of a dispute with a primary employer, was contrary to the legislative intent and in violation of this Court's decision in *NRLB* v. *Fruit and Vegetable Packers*, 377 U. S. 58, that the Act's restrictions on peaceful picketing are to be limited to those situations which were specifically considered by Congress.**

On numerous occasions this Court has noted that Congress, in enacting Section 8(b)(4) of the Act, intended to preserve the right of unions to engage in peaceful picketing except in certain specifically considered situations. Section 8(b)(4) has been referred to as "one of the most labyrinthine provisions ever included in a federal statute."[5] Literally interpreted, it would bar all picketing, primary as well as secondary, and including constitutionally protected

[5] Aaron, "The Labor-Management Reporting and Disclosure Act of 1959" (Pt. 2), 73 Harv. L. Rev. 1086, 1113 (1960).

picketing. See *Local 761* vs. *NLRB*, 366 U. S. 667, 672 (1961). However, consistent with the legislative history, this Court has given Section 8(b)(4)(i)(ii)(B) a quite narrow construction. Thus, in the recent case of *NLRB* v. *Fruit and Vegetable Packers*, 377 U. S. 58 (1964), the Court stated:

> "Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable. 'In the sensitive area of peaceful picketing Congress has dealt explicitly with isolated evils which experience has established flow from such picketing.' *Labor Board* v. *Drivers Local Union*, 362, U. S. 274, 284 e L ed 2d 710, 718, 80 S. Ct. 706. *We have recognized this congressional practice and have not ascribed to Congress a purpose to outlaw peaceful picketing unless 'there is the clearest indication in the legislative history,' ibid.*, that Congress intended to do so as regards the particular *ends* of the picketing under review. Both the congressional policy and our adherence to this principle of interpretation reflect concern that a board ban against peaceful picketing might collide with the guarantee of the First Amendment." (Emphasis supplied.)

Reference to the legislative history of the secondary boycott provisions reveals that Congressional attention was focused only on disputes involving unions and employers, and on efforts by unions to enlist the support of neutral employers to further their causes in disputes with *primary* employers. The legislative history is replete with references showing that a primary employer is a necessary prerequisite to a secondary boycott charge, and nowhere is there even the slightest suggestion that Section 8(b)(4)(i)(ii)(B) was to apply in situations where no primary employer was involved. Thus, Senator Goldwater, one of

the leading proponents of a broad prohibition of secondary activity, in the course of the discussions in the Senate on the proposed amendments to Section 8(b)(4), introduced a glossary of terms to be used in the debate. The following definition of "secondary employer" was adopted without objection:

> "Secondary employer." He is the employer who does business with the *primary employer* that is engaged in a labor dispute." 2 Leg. Hist. 1389. (Emphasis supplied)

Similarly, Senator McClellan in discussing the proposed legislation stated:

> "This bill would amend Section 8(b)(4) of the Taft-Hartley Act to prohibit certain types of coercion of the employer, and particularly, to prevent coercion by picketing at the premises of the secondary employer in order to prevent customers from doing business with the employer *primarily involved in a labor dispute.*" 2 Leg. Hist. 1007. (Emphasis supplied)

Many other congressmen spoke on this legislation and described the type of conduct to which it applied. In every instance, the illustration referred to a dispute involving a *primary* employer.[6]

Considering the extensive legislative history available, one would certainly expect to find at least some reference to the possible application of Section 8(b)(4)(i)(ii)(B)

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[6] See 2 Leg. Hist. 994 (Statement of Secretary of Labor Mitchell introduced into Cong. Record); 2 Leg. Hist. 1079, 1303 (Statement of Senator Goldwater); 2 Leg. Hist. 1193, 1194, 1196 (Statement of Senator McClellan); 2 Leg. Hist. 1470 (Statement of Rep. LaFore); 2 Leg. Hist. 1519 (Statement of Rep. Landrum); 2 Leg. Hist. 1523 (Statement of Rep. Griffin); 2 Leg. Hist. 1526 (Statement of Rep. Hoffman); 2 Leg. Hist. 1580 (Statement of Rep. Rhodes.)

of the Act to disputes not involving a primary employer, if, in fact, Congress intended that it be so applied. The complete absence of any such reference in the legislative history is a clear and positive indication that Congress did not contemplate that Section 8(b)(4)(i)(ii)(B) would be so interpreted. In light of this legislative background, due regard for the admonition in *NLRB* v. *Fruit and Vegetable Packers, supra*, that peaceful picketing is not to be outlawed unless "there is the clearest indication in the legislative history," compels the conclusion that Section 8(b)(4) does not apply to the kind of dispute involved here.

There is nothing new in the contention that a dispute with a primary employer is a *sine qua non* to a secondary boycott. The specific question arose in *Douds* v. *International Longshoremen's Association*, 224 F. 2d 455 (2nd Cir.) *cert. denied*, 350 U. S. 873 (1955), which involved an inter-union dispute on the New York waterfront. There one union, in retaliation for picketing by a rival union, refused to handle goods that were delivered by a third union because the third union had respected the rival's picket line. In finding that this conduct was not a violation of the Act, Judge Learned Hand stated (225 F. 2d at 458-59):

> "We shall for the moment assume that whatever was a violation of §8(b)(4)(A), 29 U. S. C. A. §158(b)(4)(A), was disobedience of the order and address ourselves to whether the refusal was such a violation. It was not, we think, within the three most recent decisions of the Supreme Court construing the section. In the first place it was not a 'secondary boycott' in the usual meaning of that term; *for that presupposes a labor dispute between the employees of one employer, with whom another employer has business relations, as a customer, or as the course of his material, or the like.* It further

> presupposes that the employees of the second employer, wishing to make common cause with those of the first, strike, or threaten to strike, against their own employer, unless he will discontinue his relations with the first, by this means putting pressure on the first to come to terms with his own employees . . . In the case at bar it is true that the '807' drivers were in a different craft from the longshoremen, but the 'object' of the 'Independent's' refusal to serve their trucks was not to advance the union solidarity, *but a move against '807' for taking part in the dispute between itself and the 'AFL-ILA.' If this was within the statute it means that a union may not advance its own cause in a dispute with another to gain representation, if the step it takes causes a cessation of business between its employer and a third person, or between two third persons.* It is one thing to say that such interference is unlawful when its 'object' is the promotion of unionism in general, and a very different thing to forbid such a sanction as part of the contest for control. We start therefore with the premises that, if the section goes so far, it ought to appear very plainly in the text, and we do not think that it does." (Emphasis supplied.)

In the instant case, the Court below rejected *Douds* v. *International Longshoremen's Association, supra,* and adopted an interpretation of Section 8(b)(4)(i)(ii)(B) that is far broader than anything that has heretofore been approved by any court. Focusing only on the fact that the employers who filed charges were "neutrals," and ignoring the fact that the NMU unlicensed seamen, who were being deprived of their jobs by MEBA's illegal picketing, were as neutral in this dispute as any of the employers, the lower court concluded that *any* picketing which injured neutral employers ran afoul of Section 8(b)(4). So unreasonably broad and unworkable was this holding, that

the Court immediately felt compelled to recognize an exception for so-called "situs" cases. Then, having created this exception, the Court proceeded to distinguish *Douds* v. *International Longshoremen's Association, supra* on the ground that it was a "situs" case. This distinction we submit, is without merit. The "situs" in the so-called situs cases has always been that of an *employer*, and the cases relied on by the court below all involved labor disputes with *employers*. *Douds* v. *International Longshoremen's Association, supra*, did not involve a dispute with an employer and, therefore, under no circumstances could it be considered a "situs" case.

Even if the theory of the situs cases were to be applied by analogy, the lower Court's distinction still would be erroneous as the NMU picketing clearly fell within the sphere of protected activity under the *Moore Drydock* rules. In fact, the Trial Examiner so found in the New Orleans case:

> "Another approach, not urged by Respondent, might be taken. Assume, arguendo, MEBA to be an employer with whom the NMU had a primary dispute and the members of MEBA to be MEBA employees. The picketing would then clearly meet the standards imposed by the Board in Moore Drydock Co. The picketing occurred while MEBA's engineers were present on the ships; the picketing was limited to the area close to the ships, the gangplanks or the sides; the picket sign legends indicated clearly that the dispute was with MEBA alone; MEBA's engineers were engaged in MEBA's normal business on the ships. It would not be necessary to apply the modifications to Moore Drydock imposed by the courts in Salt Dome, supra, and in Otis Massey Co., and by the Board in its recent New York Power & Wire Electric Co. decision to sustain the conduct of the NMU here" 147 NLRB No. 147, Trial Examiner's Decision, page 9.

The Court below also attempted to justify its decision by noting that Congress in enacting Section 8(b)(4) was concerned with jurisdictional disputes. It is clear, however, that the instant dispute was not a jurisdictional dispute for NMU and MEBA were not competing for the same jobs, see *NLRB* v. *Radio Engineers Union*, 364 U. S. 573, 579 (1961), and no charges were ever filed under the jurisdictional dispute provisions of the Act. Moreover, the term "jurisdictional dispute" is not one to be loosely used. It is a term of art having a very definite and limited meaning. When the Taft-Hartley amendments were added to the National Labor Relations Act, Congress made specific provision for the settlement of jurisdictional disputes. See Sections 8(b)(4)(D) and 10(k) of the National Labor Relations Act, 29 U. S. C. §158(b)(4)(D) and 29 U. S. C. §160(k). At the same time, Congress did not consider and made no provision for the settlement of the instant type of dispute, a factor which, in itself, compels the conclusion that Congress did not intend to permit the Board to intervene in these circumstances. The history of our national labor policy has been one of strengthening unions and preserving their right to engage in peaceful picketing. Consistent with this policy, when Congress enacted Section 8(b)(4)(D) restricting the right to picket in jurisdictional disputes, it was careful to create an alternative means of settling such controversies through the Section 10(k) proceeding. *NLRB* v. *Radio Engineers Union, supra.* Not having created any machinery for resolving disputes such as the one involved here, it must be assumed that Congress intended in such cases to leave unions free to pursue their traditional means of self-protection, including the right to engage in peaceful picketing. Any other result would leave a victim of illegal picketing, such as NMU in this case, defenseless against the

type of lawless conduct practiced by MEBA. For this reason, the analogy to jurisdictional disputes is most inappropriate and, on the contrary, supports the conclusion that Section 8(b)(4) does not embrace the instant type of controversy.

## Conclusion.

The provisions of the National Labor Relations Act under consideration in these cases are among the most vital in the statute and are of fundamental importance to our national labor policy. The issues presented here affect a countless number of cases which routinely come before the National Labor Relations Board. The decisions of the Court below and of the District of Columbia Court of Appeals in the related case constituted a radical departure from principles established by this Court for the interpretation and application of Section 8(b)(4) of the Act, and not only violate the legislative intent, but encroach upon the right of unions and their members to participate in peaceful picketing and to engage in other activities which heretofore have been held to be proper and constitutionally protective. This departure from established principles and the resulting conflict among the Courts of Appeals for the several circuits warrants review by this Court. Accordingly, it is respectfully submitted that this petition for a Writ of Certiorari should be granted to the end that the decision of the Court below be reversed.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
Counsel for Petitioner.

# APPENDIX A.

## Statutes.

NATIONAL LABOR RELATIONS ACT

§2. Definitions

(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

§8. Unfair Labor Practices.

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * * * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been cer-

tified as the representative of such employees under the provisions of section 9:

* * * * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

* * * * *

§10. Prevention of Unfair Labor Practices

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to ques-

tions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

NORRIS-LAGUARDIA ACT

§13. Definitions

When used in this chapter, and for purposes of this chapter—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

* * * * * *

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

## APPENDIX B.

## Opinion of the United States Court of Appeals, for the Second Circuit.

No. 234 and No. 235—September Term, 1964.

(Argued January 15, 1965. Decided March 5, 1965.)

Docket No. 29067 and Docket No. 29068

[Same Title.]

Before:

Smith, Kaufman and Anderson,
*Circuit Judges.*

Anderson, Circuit Judge:

On June 10, 1963 the SS. *Maximus*, owned by Cambridge Carriers, Inc., docked at Pier 84 South in Philadelphia. The vessel had been commissioned to take food and drugs to Cuba in exchange for prisoners. Although the Grace Line, from which Cambridge had acquired the vessel a short time before, had a contract with Marine Engineers Beneficial Association (hereinafter referred to as MEBA), an affiliate of Seafarers International Union (referred to as SIU), Cambridge had collective bargaining agreements with National Maritime Union (referred to as NMU) and employed, as engineers, members of NMU's affiliate, Brotherhood of Marine Officers (referred to as BMO).

Shortly after the SS. *Maximus* docked, MEBA picketed at Pier 84 and displayed placards describing Cambridge as unfair to MEBA engineers. At the same time a stevedoring company failed to order the necessary gangs, thus preventing the loading of the vessel's cargo and immobilizing her crew.

In retaliation NMU established picket lines at various piers in the ports of Philadelphia, Houston and Galveston

where there were docked ships which had MEBA members in their crews. The placards of the picketers bore the legend "Informational Picketing" and said, "MEBA Engineers Interfere With Lawfully Recognized N. M. U." In Philadelphia the NMU picketing commenced on June 14 at Pier 27 on the north side of which the Weyerhaeuser vessel *George S. Long*, manned by MEBA engineers, was moored. On June 19, the picketing was extended to cover the vessel *Portmar*, owned by Calmar Steamship Corporation, also manned by MEBA engineers, which was moored on the south side of Pier 27. Nacirema Operating Co., a corporation performing stevedoring services in Philadelphia for Calmar and Weyerhaeuser, and Hinkins Steamship Agency, Weyerhaeuser's agent for soliciting and receiving cargo, were unable to perform their duties because of the refusal of the longshoremen to cross the picket line which was on a public street across the entrances to the north and south sides of the pier. Hinkins asked that the picket lines be removed, but was told by one Jardine, the picket captain, and one Parisi, NMU's port agent, that the request was impossible. Previously, just before pickets were placed to cover the south side of the pier, Jardine had been asked by a clerk for Weyerhaeuser's cargo agent whether or not there was any objection to the company's receiving freight on the south side of the pier and Jardine said that there was. Pickets were thereupon placed there, and unloading operations ceased. Similarly, Calmar was unable to have its vessel *Portmar* discharged of cargo. When Calmar's agent asked Jardine to move the picket line so that the work could go forward, Jardine refused.

In Houston and Galveston similar work stoppages occurred as employees of the stevedoring companies refused to perform services. At Houston there were eight ships at the Navigation District wharves and eight ships at Long Reach docks. As a result of the picketing and while it lasted, no ships handled cargo and no work of any kind was done at the docks. NMU's port agent at Houston, one

McDowell, knew that the work stoppages resulted from picketing at that port; he so reported to NMU's headquarters in New York, and when, on June 20, 1963, the picketing ended in Philadelphia and he was so advised, McDowell said to reporters in Houston, "I have just called off my pickets, and as far as I am concerned the port can get back into operation."

At Galveston unloading of Delta Steamship Lines' vessel *Del Alba* at Pier 35 was discontinued on June 17, 1963 as soon as NMU commenced picketing the pier and the work stoppage continued during the two days the pier was picketed. The NMU had no dispute with any of the shipowners, stevedoring companies or other employers at any of the docks it picketed in Philadelphia, Houston or Galveston. On the surface, the NMU's object was informational—to appeal to the public and to the MEBA rank-and-file so that they would protest against the allegedly unlawful picketing of the *Maximus*. But NMU made no attempts in any of the three ports to publicize by mass communications its dispute with MEBA, nor was there picketing of MEBA's headquarters. Likewise, there was a failure to inform longshoremen that it would be permissible for them to cross the picket lines and no plan was instituted, despite requests, to alter the method of picketing in order to permit the work to resume. In fact, in all ports the leaflets distributed were addressed not alone to MEBA members, but to all union men, exhorting them to cooperate with NMU in fighting MEBA and warning the shipowners and stevedoring companies that if they were unable to "stand up to outfits that try to put pressure on them in a phony beef, then they're really going to be in trouble."

Upon the foregoing facts the National Labor Relations Board found that NMU had violated §8(b)(4)(i)(ii)(B), 29 U. S. C. §158(b)(4)(i)(ii)(B), by inducing and encouraging employees of Weyerhaeuser, Calmar, Hinkins and Nacirema and employees of certain Houston and Galveston stevedoring companies to refuse to perform services for

their employers and by threatening and coercing neutral employers with an object of forcing or requiring them to cease doing business with each other. The Board conceded that in each case NMU's ultimate object—protecting itself in a representation dispute with a rival union—was lawful. Under these circumstances, peaceful picketing directed solely at MEBA members and publicity directed at the unorganized public would have been beyond the purview of the statute. The Board concluded, however, that the immediate aim and purpose of the picketing was to exert economic pressure on the employers involved through cessation of business to compel them to cause MEBA to end the controversy on the *Maximus*, and hence the picketing was violative of §8(b)(4)(i)(ii)(B). In each case it ordered NMU to cease and desist from the unfair labor practices found and to post appropriate notices.

The petitioner asks for a review of these orders and a denial of enforcement on the grounds (1) that the controversy here does not constitute a "labor dispute" within the definition of those words in §2(9) of the Act, 29 U. S. C. §152(9), and that therefore the Board had no jurisdiction, (2) that because the real dispute here was with MEBA, another union, and there was no dispute with a "primary employer," there could be no "secondary boycott" within §8(b)(4), 29 U. S. C. §158(b)(4), and, (3) that the Board's order infringed NMU's right of free speech.

We are satisfied that the controversy with which this case is concerned is a "labor dispute" within the definition of §2(9). It is a controversy which concerns the association or representation of persons in maintaining terms or conditions of employment. It is true as the petitioner states that NMU had no quarrel at the time with Cambridge as the owner of SS. *Maximus* with whom NMU had a contract. It was, however, by affirmative action of its own, seeking to fend off or retaliate for picketing of the SS. *Maximus* by MEBA in their continuing warfare to gain or retain the upper hand in representing maritime employees.

Several employers and their employees were directly affected. Both the purposes of the Act and the definition of "labor dispute" are broad and encompass the factual circumstances here presented. The definition of "labor dispute" in this Act and in the Norris-LaGuardia Act, §13(c), 29 U. S. C. 113(c), are virtually identical. In *Milk Wagon Drivers' Union, Local No. 753* v. *Lake Valley Farm Products, Inc.*, 331 U. S. 91, 99-100 (1940), the Supreme Court said:

> "This merely transformed the defendants' activities from an effort to organize non-union men to a conflict which included a controversy between two unions. A controversy 'concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment' is expressly included within the definition of a labor dispute in the Norris-LaGuardia Act."

We see no reason why the same definition should be given a narrower construction or interpretation for the broad purposes of the Labor Management Relations Act. The petitioner advances as a reason for doing so that in the Norris-LaGuardia Act there are, in addition to the definition of "labor dispute" in §13(c), the provisions of §13(a) which describe the parties which must be implicated to constitute cases which "involve or grow out of a labor dispute." From this it argues that the absence of a provision in the Labor Management Relations Act, similar to §13(a) of the Norris-LaGuardia Act, compels the conclusion that the Board's jurisdiction under §2(9)—a provision which it claims is "narrower" in its scope than §13 of the Norris-LaGuardia Act, read in its entirety—does not extend to inter-union controversies. This argument is not persuasive. The effect of §13(a), though broad in itself, is to limit the cases which can be held to "involve or grow out of" a labor dispute. It does not change the definition of a labor dispute in the least. The Labor Management Relations Act contains

no such limitation. Moreover, in *Milk Wagon Drivers' Union* the Supreme Court did not concern itself with §13(a) for its interpretation of the definition of "labor dispute." *Matson Navigation Company* v. *Seafarers International Union,* 100 F. Supp. 730 (D. Md. 1951). It also appears that for the purpose of determining whether particular union activity is subject to §8(b)(4) of the National Labor Relations Act and that state jurisdiction over the matter is thereby displaced, no distinction is made between secondary activity which is a part of a controversy between a union and an employer or between two unions. *San Diego Building Trades Counsel* v. *Garmon,* 359 U. S. 236 (1959); *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468 (1955).

The character of the underlying dispute in the present case comes well within the statutory definition. It is not merely peripheral to it or completely outside of it as was the case in *National Labor Relations Board* v. *International Longshoremen's Association,* 332 F. 2d 992 (4th Cir. 1964) in which the cause of work stoppage was purely political, i.e. refusal to load cargo on a vessel because it was destined for delivery to Cuba.

The Petitioner also asserts that there can be no violation of §8(b)(4) unless there exists a dispute with a primary employer. In effect it argues that §8(b)(4) was enacted to prohibit the use of a secondary boycott and that a secondary boycott cannot exist unless there is a dispute between the union and a primary employer. The statute does not use either the term "secondary boycott" or the term "primary employer." It is true that these words frequently appear in the legislative history for the reason that they assist in describing the most usual form of the kind of activity Congress intended to proscribe but Congress did not use those terms in the statute nor did the Senators and Representatives show by using them in debates and reports that the operation of the statute was to be coextensive with the usual meaning of those terms. Indeed, the Supreme Court has said that all secondary

boycotts were not outlawed in §8(b)(4)(A), which is the present §8(b)(4)(B).

> " 'The section does not speak generally of secondary boycotts. It describes and condemns specific union conduct directed to specific objectives. . . . Employees must be induced; they must be induced to engage in a strike or concerted refusal; an object must be to force or require their employer or another person to cease doing business with a third person. . . .' "

*Local 761, Int'l Union of Elec. Workers* v. *National Labor Relations Board*, 366 U. S. 667, 672-673 (1961). Likewise it may be said that the statute proscribes certain union conduct, directed to a specific objective, which does not fall squarely within a strict definition of secondary boycott but which is sufficiently analogous to it to be encompassed within "the broad and somewhat vague concept of secondary boycott" as the term was used in congressional debate and plainly within the kind of conduct Congress intended to prohibit.

In *Local 761, Int'l Union of Elec. Workers* v. *National Labor Relations Board*, *supra*, Mr. Justice Frankfurter also said, at p. 672, with respect to §8(b)(4)(A) [now (B)] that it could not be literally construed; otherwise it would ban most strikes historically considered to be lawful.

In interpreting the subsection the courts have reduced it in its effect to something less than its broad literal wording, not to conform to legislative predilections of their own, but on the necessary assumption that Congress intended to proscribe peaceful picketing only where such prohibition was necessary to stop union conduct which experience had shown to be damaging and undesirable and where there was, therefore, a reasonable basis for preventing conduct which otherwise could not be forbidden because of the First Amendment. As a natural consequence of this assumption, the courts have required that the acts sought to be prohibited plainly appear from the legislative history to be

included within the kind or type of harmful conduct Congress meant to prevent. *National Labor Relations Board* v. *Fruit and Vegetable Packers & Warehousemen, Local 760,* 377 U. S. 58, 63 (1964).

In the process of interpretation the courts have also been mindful of the effort by Congress, in passing the Labor Management Relations Act, to balance the need, on the one hand, to preserve the "normal flow of commerce," and the need, on the other hand, to preserve the right to strike as an essential of free collective bargaining.

> "The character of the problem of reconciliation of the right to strike with the limitations expressed in §8 (b)(4) is not unlike that which confronted the Court in *Allen Bradley Co.* v. *Local Union No. 3,* 325 U. S. 797, 806:
>
> 'The result of all this is that we have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.' " *National Labor Relations Board* v. *International Rice Milling Co.,* 341 U. S. 665 (1951) at 673, n. 7.

In considering and applying these principles we are of the opinion that Congress did not intend to confine the effect of §8(b)(4) to a strict or precise definition of the term "secondary boycott" nor did it intend to require the existence of a "primary employer" as a prerequisite to the applicability of the subsection.

Attention must instead be turned to a consideration of the evils Congress sought to eliminate in enacting §8(b)(4). In *National Labor Relations Board* v. *Denver Building & Construction Trades Council,* 341 U. S. 675, 692 (1951),

the Court declared that Congress' purpose was to shield "unoffending employers and others from pressures in controversies not their own." See also *Miami Newspaper Pressmen's Local No. 46* v. *National Labor Relations Board,* 322 F. 2d 405 (D. C. Cir. 1963). Whether the striking union is at war with a primary employer and puts damaging economic pressure on a neutral employer with the design of increasing the economic pressure on the primary employer through such secondary activity or is, instead, at war with another union and, in adopting secondary activity, is using damaging economic pressure on a neutral employer to achieve its objective of prevailing over the rival union, makes no logical difference in the light of the clear purpose and intention of Congress to confine the warfare to an area which includes direct action against the principal antagonist whether it be a primary employer or a rival union and which would exclude the use of economic pressure by a union against neutral employers as an indirect means of exerting force against the union's principal target. Of course, exceptions have been recognized in so-called "situs" cases where damage to the secondary employer is only an incidental by-product of the action taken directly against the primary target and it is not an object of the union to use pressure on the secondary employer for that purpose. *New Power Wire and Electric Corp.* v. *National Labor Relations Board,* 340 F. 2d 71 (2d Cir. 1965); *National Labor Relations Board* v. *Local 294, Int'l Brotherhood of Teamsters,* 284 F. 2d 887 (2d Cir. 1960); *Seafarers Int'l Union* v. *National Labor Relations Board,* 265 F. 2d 585 (D. C. Cir. 1959); *Sailors' Union of the Pacific (Moore Drydock Co.),* 92 N. L. R. B. 547 (1950). See also §8(b)(4)(e) of the Act. Exceptions also appear in the proviso of §8(b)(4) and §8(b)(7)(c) concerning informational picketing. But these do not include cases such as that now before us.

Secondary economic pressure generated in a controversy over representation or jurisdiction has no less an impact on

neutral employers than where secondary activity is resorted to in furtherance of a dispute with a primary employer. Congress' concern for neutral employers in these situations is no less great. It is absurd to suppose that Congress intended to afford the protection to unoffending neutral employers from a contest between an offending employer and its union employees but that it did not intend to afford protection to neutral unoffending employers when the employer itself was also unoffending. It certainly makes little difference to the neutral employer whether the damage he suffers is the result of a blow being delivered by the union against a primary employer or against another union. But even though Congress was doubtless motivated by a feeling that it was inherently unfair to permit unlimited injury to an innocent bystander, the most compelling reason for prohibiting such secondary activities was that the damage and disruption to the normal flow of commerce, which was an inevitable consequence, far outweighed the need of the unions for such a weapon in effective collective bargaining. See Labor Management Relations Act, 1947, I Leg. Hist. 481 and II Leg. Hist. 1047, 1108, 1368.

The petitioner relies strongly upon *Douds* v. *International Longshoremen's Association, Independent,* 224 F. 2d 455 (2d Cir.), cert. denied 350 U. S. 873 (1955). In that case a divided panel of this court held that a secondary strike to advance a union's position in a contest for representation with another union did not constitute a violation of §8 (b)(4). The members of the International Longshoremen's Association, Independent who were employees of the New York Shipping Association, which operated steamships, stevedoring companies, etc., refused to serve, at New York piers, trucks driven by A. F. of L. drivers because the trucks had refused to cross a picket line set up at the piers by a rival longshoremen's union which was A. F. of L. affiliated. This caused an almost complete cessation of business at the piers. The majority of the court held (L. Hand, *J.*), that, inasmuch as the ultimate objective

of the independent union was to win out in a struggle with the A. F. of L. affiliated union for control of the port, it did not matter that the means used to achieve that end or any intermediate objectives that may have been entertained violated §8(b)(4) because the final objective was legitimate. It also found that the facts did not fit the usual meaning of "secondary boycott" at the same time noting that §8(b)(4) goes further than prohibiting secondary boycotts in the usual meaning of that term. All of the activity under consideration in the case took place at certain piers in New York City where the employer carried on its business and where incoming and outgoing cargoes were dealt with by longshoremen who received them from or delivered them to truckers, to be taken aboard the ships or delivered to consignees, as the case might be. While the court did not expressly treat this as a "situs" case, the particular circumstances generated the innumerable complexities which characterize those cases. Everything took place at the premises where the employer's business was located. Neither of the struggling union contestants had the right to represent the employees. An election had been held but the result was under review and had not been determined. That some union should have the right to represent the employees was vital to the very existence of free collective bargaining and the contest between the unions was closely bound to the rights of the employees to have someone bargain for them. Difficulties, later cured by the 1959 amendment to §8(b)(4) and by §8(b)(7), added to the complexities of the case. It is evident that this court endeavored to cut the Gordian knot by adopting the premise that, if the ultimate objective of the union was legitimate, §8(b)(4) was not at all concerned with how, on the facts there presented, the union achieved it. The circumstances of the present case are obviously quite different in that the activity indulged in here encompassed widely scattered employers and employees who had no direct connection with the inter-union contest going on at Pier 84, South, in Philadelphia.

Moreover, both MEBA and NMU had outstanding contracts which, between them, covered all maritime employees directly concerned, so that no group was struggling to achieve representation, for collective bargaining purposes, in a situation where it had none. We do not feel that the principles enunciated in *Douds* v. *International Longshoremen's Association, Independent, supra*, should be employed in deciding the present case. To apply to this case the concept that §8(b)(4) interdictions are not to be considered if the final object of the union is lawful, would place the decision of this case at odds with the statute which requires only that *an* object (not the ultimate object) of the strike or refusal to transport, handle, etc., is forcing any person to cease doing business with any other person. It would be at odds with the Supreme Court's statement in *National Labor Relations Board* v. *Denver Building & Construction Trades Council, supra*, at 689, that:

> "It is not necessary to find that the *sole* object of the strike was that of forcing the contractor to terminate the subcontractor's contract. This is emphasized in the legislative history of the section."

See also *Local 1976, United Brotherhood of Carpenters and Joiners of America* v. *National Labor Relations Board*, 357 U. S. 93, 98 (1958). It has had no persuasive following in other circuits which have passed upon cases under §8 (b)(4) in which the lawful ultimate object theory could have been followed. *National Labor Relations Board* v. *Local 101, International Union of Operating Engineers, AFL-CIO*, 315 F. 2d 328, 330 (10th Cir. 1963); *Local No. 636, United Association of Journeymen and Apprentices of Plumbing and Pipe Fitting Industry of United States and Canada, AFL-CIO* v. *National Labor Relations Board*, 278 F. 2d 858 (D. C. Cir. 1960); *Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, Local 88* v. *National Labor Relations Board*, 237 F. 2d 20 (D. C. Cir. 1956); *National Labor Relations Board* v. *Local 11,*

*United Brotherhood of Carpenters & Joiners of America, AFL*, 242 F. 2d 932 (6th Cir. 1957). Cf. *National Labor Relations Board* v. *United Brotherhood of Carpenters and Joiners of America, AFL-CIO*, 261 F. 2d 166 (7th Cir. 1958).

This court has not applied such a doctrine in any related case since *Douds* was decided nor has it been discussed nor has reference been made to it. *National Labor Relations Board* v. *Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 273 F. 2d 696 (2d Cir. 1960); *National Labor Relations Board* v. *Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 284 F. 2d 887 (1960); *National Labor Relations Board* v. *Milk Drivers and Dairy Employees Local Union No. 584, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*,——F. 2d——(2d Cir. Jan. 26, 1965).

The respondent Labor Board found the facts recited above; the findings are fully supported by the evidence. The Board concluded that NMU's picketing at Philadelphia, Houston and Galveston induced and encouraged individuals employed by steamship agents, stevedoring companies and marine warehouse operators in those parts to strike and to refuse in the course of their employment to perform services for their employers within the meaning of §8 (b)(4)(i) and that the picketing constituted coercion and restraint of those employers within the meaning of that section, and that the object of this conduct was to bring about a cessation of business at the particular piers between the employers mentioned and the owners and operators of the vessels and anyone else doing business with any of them at the piers. We find no error in these conclusions; they are amply supported by the record as a whole. The petitioner takes particular exception to the use by the Hearing Examiner of the term "foreseeable consequences," in connection with the work stoppage following the establishment of one or more of the picket lines,

as an element in the proof that this was "signal" picketing. Such a phrase, with its tort implications, is not descriptive of a proper basis for concluding that picketing is signal picketing because a work stoppage might be highly probable in response to what was genuinely intended to be nothing more than informational picketing and the union might immediately after such stoppage make it clear to all concerned that no such result was intended. Under such circumstances there would be no violation of §8(b)(4) even though a reasonably prudent man would have foreseen that such cessation of business would occur. In this case both from what the union said and did and from what it failed to say and do to make clear that no work stoppage was sought, there was ample evidence, separate and distinct from any consideration of foreseeability, to show that cessation of business was what the union intended to achieve all along and that its activity was in fact "signal picketing." The use of the phrase was harmless under these circumstances.

Having determined that the Board was correct in concluding that an object of petitioner's picketing was to induce work stoppages among employees of secondary employers to force such employers, through economic pressure, to support petitioner's retaliation against MEBA, in violation of §8(b)(4), we find that there is no substance to the petitioner's claim that its rights under the First Amendment to the Federal Constitution have been impaired. *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U. S. 694, 705 (1951).

The petitions to review are dismissed and enforcement is granted on both of the cross-petitions.

## APPENDIX C.

## Decree.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

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**No. 29067.**

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NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Petitioner,

*v.*

NATIONAL LABOR RELATIONS BOARD,
Respondent.

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Before: SMITH, KAUFMAN and ANDERSON, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the National Maritime Union of America, AFL-CIO, to review and set aside a certain order of the National Labor Relations Board issued against petitioner, on June 30, 1964, and upon cross-petition of the National Labor Relations Board to enforce said order. The Court heard argument of respective Counsel on January 15, 1965, and has considered the briefs and the transcript filed in this cause. On March 5, 1965, the Court being fully advised in the premises, handed down its decision enforcing the order of the National Labor Relations Board.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that National Maritime Union of America, AFL-CIO, its officers,

agents, and representatives abide by and perform the directions of the Board in said order contained.

J. JOSEPH SMITH
Judge, United States Court of Appeals
for the Second Circuit

IRVING R. KAUFMAN
Judge, United States Court of Appeals
for the Second Circuit

Filed: April 9, 1965.

*Appendix C.*

## Decree.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

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**No. 29068.**

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NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Petitioner,

*v.*

NATIONAL LABOR RELATIONS BOARD,
Respondent.

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Before: SMITH, KAUFMAN and ANDERSON, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the National Maritime Union of America, AFL-CIO, to review and set aside a certain order of the National Labor Relations Board issued against petitioner, on June 30, 1964, and upon cross-petition of the National Labor Relations Board to enforce said order. The Court heard argument of respective Counsel on January 15, 1965, and has considered the briefs and the transcript filed in this cause. On March 5, 1965, the Court being fully advised in the premises, handed down its decision enforcing the order of the National Labor Relations Board.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that National Maritime Union of America, AFL-CIO, its officers,

agents, and representatives abide by and perform the directions of the Board in said order contained.

J. Joseph Smith
Judge, United States Court of Appeals
for the Second Circuit

Irving R. Kaufman
Judge, United States Court of Appeals
for the Second Circuit

Filed: April 9, 1965.

## APPENDIX D.

## Conflicting Opinion.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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No. 18,789

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NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Petitioner,

*v.*

NATIONAL LABOR RELATIONS BOARD,
Respondent.

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**On Petition to Review and Cross-Petition for Enforcement of an Order of the National Labor Relations Board**

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Decided April 15, 1965

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Before BAZELON, Chief Judge, and FAHY and MCGOWAN, Circuit Judges.

MCGOWAN, *Circuit Judge*: The National Maritime Union of America (NMU) has petitioned to set aside an order of the National Labor Relations Board holding it to be in violation of Section 8(b)(4)(i)(ii)(B) of the Labor-Management Relations Act, 61 Stat. 136 (1947), as amended, 29 U. S. C. §§151 *et seq.* The Board has requested enforcement. We are presented with a somewhat novel set of circumstances in which to define the reach of Congress' purpose to contain within narrow limits the industrial strife which, in the language of the legislative declaration of policy, "interferes with the normal flow of commerce"

to the detriment of the public interest. We conclude that what the Board has done here falls within the range of the statutory provisions having that purpose, and we grant enforcement of its order.

## I

The S.S. *Maximus,* while owned and operated by the Grace Line, was manned by members of the Seafarers International Union (SIU). However, upon its sale by Grace to a new owner, Cambridge Carriers, these personnel were replaced by members of NMU with whom Cambridge Carriers had an existing collective bargaining agreement.[1] Shortly after this sale, the *Maximus* was in Philadelphia to load food and drugs for Cuba as part of the ransom of the Bay of Pigs prisoners. This activity was stopped from June 10 until June 20, 1963, when SIU representatives picketed the ship carrying signs charging Cambridge Carriers with being unfair to the members of that union formerly employed on the *Maximus.* While that ship was so idled, NMU made a retaliatory counter-move. This response took the form of NMU picketing of other ships in Philadelphia, in Houston and Galveston, Texas, and in New Orleans, manned by SIU members. The order before us relates only to the events in New Orleans;[2] and these events, in turn, relate to two steamship companies.

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[1] The employees in question appear to be marine engine-room officer personnel, and the union organizations immediately involved are the Marine Engineers' Beneficial Association, an affiliate of SIU, and the Brotherhood of Marine Officers, an affiliate of NMU. For convenience, we refer throughout to the parent unions.

[2] Unfair labor charges were filed against NMU in respect of its activities at the other ports. Board orders sustaining those charges were entered in respect of Philadelphia in one case and Houston and Galveston in another. NMU's petitions to review those orders have been dismissed, and the Board's cross-petitions for enforcement granted, by the Second Circuit. *National Maritime Union* v. *NLRB,* Nos. 29,067-68, March 5, 1965.

## *Appendix D.*

Delta Steamship Lines, Inc., uses the Poydras Street wharf in New Orleans. Bloomfield Steamship Company uses the Cotton Warehouse wharf. Neither has contracts with NMU. Both have contracts with SIU. On June 17, 1963, NMU started picketing the ships of each, with signs bearing the legend: "Information picketing. MEBA [SIU] Engineers interfere with employers lawfully recognizing NMU."

In the case of Delta, one of its ships, the S.S. *Del Valle,* was in port at the time the picketing began. The longshoremen ordered by Delta on June 17 and 18 appeared on the dock but would not cross the picket line at the foot of the gangplank. At 1:00 P.M. on June 18, the *Del Valle* was moved away from the wharf to a general anchorage point, and the picketing stopped. Later that afternoon, another Delta ship, the S.S. *Del Mar,* arrived at the wharf. There being no pickets, the longshoremen ordered by Delta boarded the ship and began unloading it. The next morning the pickets reappeared, and the longshoremen would not cross the line. This same morning the *Del Valle* was brought back to the wharf but the longshore gangs ordered for it similarly observed the line. This continued until the afternoon of the 20th, at which time, the SIU picketing of the *Maximus* in Philadelphia having ended, the NMU picketing in New Orleans stopped.

Delta meanwhile had, on June 17, concluded that certain repairs needed to be made to the *Del Valle.* The work was awarded to two local companies unaffiliated with Delta. The general manager of one informed Delta, upon finding the picket line, that his men would not cross it. The shop superintendent of the other came to the wharf to take a part away for repair, but would not cross the line to remove the part. Delta's own carpenters and painters in New Orleans, after consultation with their union business agents, refused to come aboard to do their usual work on ships in port.

*Appendix D.*

Bloomfield had one ship, the *Neva West,* at its dock on June 17. As in the case of Delta, carpenters and longshoremen reporting upon order would not cross the picket line.[3] The pipefitter foreman of a local marine repair company, which had received an order from Bloomfield to do some work, upon asking permission of a picket to go aboard to make the repair, was told that he could not do so. On June 18, Bloomfield's vice president in New Orleans called NMU's port agent. The former represented that the *Neva West* required only a few hours work in order to clear the port, and that the delay was subjecting Bloomfield to losses it could not prevent. The NMU agent refused this request to call off the pickets, as he did a similar and more urgent request the next day. The agent purported to recognize the truth of Bloomfield's pleas that it had no apparent power to solve NMU's problems in Philadelphia, but he told the Bloomfield officer: "We want you to be good and mad . . . . I want you to call Paul Hall [the International President of SIU] and tell him to call off the MEBA [SIU] pickets on the *Maximus.*

II

NMU argued to the Board that its picketing was purely informational in character, designed solely to apprise SIU crew members on the ships in New Orleans of the arbi-

[3] An employer known as States Marine Corporation had been retained by Bloomfield to service its ships. States Marine customarily had fork lift operators working on the wharf. The NMU pickets first took up positions at a street intersection leading to the wharf. When the fork lift operators would not cross this picket line to get to their duties on the wharf, their representative suggested to the pickets that perhaps they were at the wrong place. One of the pickets left to make a telephone call and, upon returning, said: "We are not picketing the docks. We are picketing the ship to keep the longshoremen from going on." Thereupon the picket line was moved to the immediate vicinity of the ship, and the fork lift operators proceeded to their usual duties on the docks. States Marine's orders for carpenters and longshoremen were placed with T. Smith & Company, an independent stevedoring company.

trary conduct of their brethren in Philadelphia and thereby to generate a grass-roots insistence that this shadow be lifted from the fair name of SIU. The Board did not believe this claim to be borne out by the facts. Although accepting NMU's protestations that it had no quarrel with either Cambridge Carriers in Philadelphia, or Delta and Bloomfield in New Orleans, the Board found that the purpose of the New Orleans picketing was to close down and prevent all cargo handling and maintenance and repair operations on the ships in question. It found this purpose not only in the peculiar susceptibilities of all waterfront labor to the appearance of a picket line irrespective of what the signs say, but more concretely in the evidence of the particular picketing arrangements and the acts done and statements made by NMU personnel in connection with it. The Board translated these findings into the unfair labor practices banned by Section 8(b)(4)(i) and (ii)(B) of the Act. It considered that its findings established that NMU had fallen afoul of these provisions of the statute by having induced and encouraged individuals employed by Bloomfield, Delta, and the local stevedores and service contractors to refuse to perform work aboard the three ships, and by coercing and restraining those employers, all with the object of forcing or requiring such employers to cease doing business with each other.

The facts as found by the Board appear to us to be supported by substantial evidence in the record; and, indeed, NMU's contentions here are not founded upon any significant challenge to those findings.[4] We are also of

[4] NMU argues that the Board assumed the ultimate fact in issue (*i.e.*, NMU's purpose to shut down operations on the ships rather than merely to inform the SIU crewmen) by reliance upon inadmissible hearsay testimony. The questioned testimony is that of (1) the pipefitter foreman of Dixie Machine Metal and Welding Works, Inc., who related that a picket told him he could not go aboard the *Neva West* to pick up a part for repair and (2) the representative of the fork lift operators, who said he was told by a

the view that those facts fit within the contours of the language used by Congress in Section 8(b)(4)(i) and (ii)(B).[5] NMU argues to us, however, that the mere matching of fact to word does not automatically conclude the matter, and we do not reject that proposition out of hand in the case of this part of the Act. It has been vividly but accurately characterized as "one of the most labyrinthine provisions ever included in a federal labor statute"; and the Supreme Court has admonished that at least one of its component sections cannot be applied literally.[6] NMU suggests three reasons why the Board's order cannot stand:

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picket that the purpose of the picketing was to keep the longshoremen from going aboard the *Neva West*. The crux of the hearsay objection is that, since these pickets were unidentified, they could not be cross-examined. But these were NMU's own pickets, who numbered three and two, respectively, at the times in question, and no reason appears why they could not have been called to deny the statements if they had not in fact been made. Further, these statements were thought by the Board to be in keeping with the responses given by NMU's New Orleans representative to Bloomfield's pleas to remove the pickets; and we agree.

[5] Section 8(b)(4) makes it an unfair labor practice for a labor organization:

> (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in any industry affecting commerce, where in either case an object thereof is—
>
> . . .
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . .

[6] Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1113 (1960); *Local 761, Int'l Union of Elec. Workers* v. *NLRB*, 366 U.S. 667, 672 (1961).

one is couched in jurisdictional terms; the second asserts that a proper construction of the statute excludes the conduct in question from its ban; and the third descries constitutional impediments to be overcome if the first two fail to command acceptance.

III

NMU first argues that the Board was without jurisdiction to entertain this unfair labor practice complaint because there was no "labor dispute," as that term is defined in Section 2(9) of the Act. But Section 2 is the "Definitions" section of the Act, reflecting a salutary technique of modern legislative draftsmanship whereby words and phrases used elsewhere in the statute in substantive contexts are given precise definition. Section 2 does not purport to define the Board's jurisdiction; and the term "labor dispute," which is defined in paragraph (9), does not appear at all in the part of the statute with which we are presently concerned, that is to say, Section 8(b)(4)(i) and (ii)(B). There are, of course, other sections of the Act in which "labor dispute" is an operative term, but nowhere in the Act is there an overriding declaration that none of its provisions apply unless there is a "labor dispute" as defined in Section 2(9).

The only authority cited by NMU in support of its jurisdictional point is *NLRB* v. *International Longshoremen's Ass'n,* 332 F.2d 992 (4th Cir. 1964). There the Board had found an unfair labor practice violative of Section 8(b)(4)(ii)(B) in the refusal of a union to supply men to load a British ship which had been engaged in the Cuban trade. At the time of the Cuban missile crisis in October, 1962, the union adopted a policy of refusing to load ships which had taken part in such trade, and the ship in question, the S.S. *Tulse Hill,* was named on the union's blacklist. Thus, upon the *Tulse Hill's* arrival at Baltimore in January, 1964, the union failed to respond to the request of Maryland Ship Ceiling Com-

pany, an independent stevedoring company, for gangs of carpenters to fit the ship for cargo. There was no picketing of the ship nor any other kind of interference with its operations.

The Board's jurisdiction was attacked on the ground, among others, that there was no "labor dispute" as defined in Section 2(9). With one judge dissenting, two members of the court accepted this argument. They appeared to regard the union activity complained of as political in character and, accordingly, as not within the purview of the Act. They justified this construction of the Act by saying that a "labor dispute" as defined in Section 2(9) relates to terms and conditions of employment, which the ideological differences before them did not, and by noting that the Act was passed, in the words of the Supreme Court, "to regulate the conduct of people engaged in labor disputes." *Marine Cooks & Stewards* v. *Panama S.S. Co.*, 362 U. S. 365, 372 (1960).

The court, however, did not think it the part of prudence to stand upon this finding of a complete lack of jurisdiction in the Board. Noting that it was "dealing with a case of first impression and one likely to be offered for a review on certiorari," it thought it appropriate to reach the merits as a hedge against the possibility that the Supreme Court might view the jurisdictional issue differently. And, reaching the merits, it denied enforcement on the ground that the facts as found by the Board did not add up to a violation of Section 8(b)(4)(ii)(B).

We think this decision not to rest upon the jurisdictional issue a highly prudential one. The resolution made of that issue was, as the court explicitly recognized, one of "first impression," and no direct authority could be adduced for it.[7] The quoted phrase of the Supreme Court appears

[7] We note in passing that the Second Circuit, in deciding the two cases which are companions to this one, addressed itself to the question of whether a "labor dispute" existed. It concluded, on facts similar to those before us, that the controversy giving rise to the Board's orders was such a dispute, as defined by Section 2(9). See *National Maritime Union* v. *NLRB*, Nos. 29,067-68, March 5, 1965.

in a Norris-LaGuardia Act case, in which the Court was passing on the jurisdiction of a district court to enjoin a strike, not the jurisdiction of the Board to entertain a charge of an unfair labor practice. It is not our function to say whether the Fourth Circuit was right or wrong in its jurisdictional ruling in the *Tulse Hill* case. We note only that the same result in practical effect (namely, the relieving of the union from the burden of the Board's order) was reached on another basis; and we are not persuaded by the authority of that case to deny the existence of jurisdiction in this one. As the Fourth Circuit thought it wise to do, so do we move on to NMU's second contention that, even if the Board had jurisdiction, it erroneously appraised NMU's conduct as subject to the strictures of Section 8(b)(4)(i) and (ii)(B) of the Act.

## IV

NMU's argument essentially is that Congress in enacting Section 8(b)(4) was addressing itself to the matter of secondary boycotts; that the secondary boycott traditionally and necessarily entails the existence of a dispute with a primary employer; and that, since NMU had no quarrel with Cambridge Carriers in Philadelphia, the *sine qua non* of prohibited secondary activity in New Orleans was missing. It points to many passages in the legislative history where secondary boycotts are unquestionably referred to in this traditional sense.[8] And, as a decisional

[8] NMU directs us only to the legislative history of the Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519. But the Act's ban on secondary pressures first came into the law in 1947, in the Taft-Hartley Act, 61 Stat. 135 (Labor-Management Relations Act), and it is in the history of this earlier enactment that Congress' purpose must in the first instance be sought. That history suggests that many members of Congress frequently did indeed visualize the objectionable activities in terms of the popularly understood situation: The employees of employer A, with whom they have a dispute, bring pressure on the employees of employer B, a supplier or customer of A, to force B to terminate his dealings with A. See

precedent, it rests upon *Douds* v. *International Longshoremen's Ass'n*, 224 F. 2d 455 (2nd Cir.), *cert. denied*, 350 U. S. 873 (1955).[9]

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II Leg. Hist. of LMRA 1106 (1947). But the evil Congress sought to eradicate has never been so limited in its manifestations, which no doubt accounts for the breadth of its language. The House Report grouped together "sympathy strikes," "illegal boycotts" and "jurisdictional strikes" as having in common

> the characteristic that they do not arise out of any dispute between an employer and employees who engage in the activities, or, in most cases, between the employer and any of his employees. More often than not the employers are powerless to comply with demands giving rise to the activities, and many times they and their employees as well are the helpless victims of quarrels that do not concern them at all. . . .

1 Leg. Hist. of LMRA 314 (1947). The object of Section 8(b)(4) was to protect third persons who were "*wholly unconcerned in the disagreement* between an employer and his employees." II Leg Hist. of LMRA 1106 (1947) (Remarks of Senator Taft). (Emphasis added.) See *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1951).

The legislative history of the 1959 amendments reflects this earlier understanding. The bills introduced in both houses were aimed at filling the "major loopholes" in the existing ban on secondary pressure, among them the use of "hot cargo" clauses in labor agreements, the legality of coercion of employers as distinct from their employees, and the failure of the Act, as interpreted, to reach inducement or coercion of individual employees of neutral employers. The amendments were not intended to change, but to reinforce, the 1947 prohibition. See II Leg. Hist. of LMRDA 1568 (1959) (Remarks of Representative Griffin). Congress' purpose, as earlier, was to protect "*genuinely neutral employers* and their employees" (emphasis added) who were not themselves involved in a dispute. And this purpose had the approval even of those members who regarded the final amendments as destructive of the rights of unions. See II Leg. Hist. of LMRDA 1577 (1959) (Analysis of Representatives Thompson and Udall).

[9] We cannot help but note NMU's conspicuous lack of interest in the *Tulse Hill* decision as a possible precedent on the merits as distinct from jurisdiction. The reason, we think, is not far to seek. The Board's theory of the Section 8(b)(4)(ii)(B) violation in that case was that the prohibited coercion was directed against Maryland Ship Ceiling Company with the object of preventing or terminating business relations between it and the owners of the *Tulse Hill*. The Fourth

*Appendix D.*

Although the term "secondary boycott" has been widely used as a convenient short-hand reference to the conduct forbidden by Section 8(b)(4), the phrase nowhere appears in that section or, indeed, anywhere else in the Act. Certain acts, when done for a specified object, are proscribed. The mere fact that the language of this Section comprehends the familiar patterns of a secondary boycott in the customary sense does not inexorably dictate the conclusion that it excludes all variations from those patterns. Where, as here, act and object fall comfortably within the letter of the statute, the Board's hand is to be stayed only upon a persuasive showing that they are beyond its spirit.

NMU has not convinced us that they are. The legislative history of so controversial a statute as this tends to

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Circuit concluded, however, that the only circumstance found to be coercive was the simple withholding by the union of its labor. The union had not picketed or struck Maryland Ship or tried to prevent it from obtaining labor elsewhere; it "took no other measures." The court ruled that the Board's order should not be enforced because the "bare refusal to work in the circumstances shown" could not reasonably "be construed as [the] 'threats,' 'coercion,' or 'restraint'" referred to in the Act. But it added this significant comment (332 F.2d at 997):

> *While it might conceivably be an unfair labor practice* for the union to institute a general work stoppage against Maryland Ship, no such extreme action has been resorted to here. [Emphasis supplied.]

Thus, on the very facts presented in the case before us, namely, the picketing and related activities designed to prevent anyone from working on the ships, the Fourth Circuit in terms contemplated the possibility that an unfair labor practice could be said to have occurred —and this despite the absence of a dispute between anyone over wages or the other terms and conditions of employment which are the familiar fare of labor-management strife. We think this comment goes far towards explaining NMU's relegation of the *Tulse Hill* case to the background once the jurisdictional bridge has been crossed. And, even if our conjectures on this score are unwarranted, we are left in no doubt by it that the course of conduct challenged in *Tulse Hill* was vastly different from that pursued by NMU here.

be a welter of assertion and counter-assertion from which some comfort may be taken by almost any proponent of a particular construction. We are entitled to interpret Section 8(b)(4) in the light of the Congressional declaration of purpose and policy "to promote the full flow of commerce" and "to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare." A "central legislative purpose," so we have recently said, was "to confine labor conflicts to the employer in whose labor relations the conflict had arisen, and to wall off the pressures generated by that conflict from unallied employers."[10] The legislative proceedings giving rise to Section 8(b)(4) make clear that Congress wished its proscriptions to be broad enough to realize this purpose.[11]

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[10] *Miami Newspaper Pressmen's Local 46* v. *NLRB*, 116 U. S. App. D. C. 192, 197, 322 F. 2d 405, 410 (1963). This statement was made in the context of our rejection of the claim that Section 8(b)(4) applies only to disturbances of the business relationships between primary and secondary employers. We made clear our reading of the statute as covering the forced suspension of commercial intercourse between secondary employers and other persons. The Supreme Court has characterized the legislative objectives as including the "shielding [of] unoffending employers and others from pressures in controversies not their own." *NLRB* v. *Denver Bldg. & Const. Trades Council*, 341 U. S. 675, 692 (1951).

[11] See note 8 *supra*. At one point during the Senate debates Senator Taft, responding to a question from an opponent of the bill, described the aim of the section in this way:

> All this provision of the bill does is to reverse the effect of the law as to secondary boycotts. It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and *never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice.*

II Leg. Hist. LMRA 1106 (1947). (Emphasis supplied.) Compare with this the assessment of 8(b)(4) by that same opponent, Senator Pepper:

In this framework, Cambridge Carriers is the employer with whom, and Philadelphia the place, where, the trouble started. The occasion was the purchase by Cambridge Carriers of a ship which, prior to its sale, had been manned by SIU personnel. NMU now protests that it cannot be under the ban of the statute because, even if Cambridge Carriers is to be thought of as a "primary employer," NMU, representing its employees, had no quarrel with it and no occasion to put pressure upon it to do other than what it was already doing. The pressures it sought to mobilize in New Orleans, so it is said, were directed solely against SIU and not the primary employer. There are two answers to this. The first is that Congress clearly desired to protect neutral employers from the ramifying effects of inter-union, as well as union-employer, strife.[12]

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The Committee bill outlaws all kinds of so-called secondary boycotts, *even when the objective of the boycott is to preserve wage and working condition gains already achieved* by collective bargaining, even if the objective be to solicit in a peaceful way the cooperation of other workers in defending the wage and working standards of a particular community of industry.

II Leg. Hist. LMRA 1108 (1947). (Emphasis supplied.)

[12] Two facts emerge quite clearly from the extensive legislative history of the 1947 act. The first is that there was near-unanimous agreement that secondary pressures in aid of inter-union jurisdictional disputes should be prohibited. President Truman in his message to Congress named these among the "certain unjustifiable practices" that the legislation should deal with, and throughout the debates the opponents of 8(b)(4) attacked the provision because it failed to distinguish between these and other assertedly unobjectionable uses of the boycott. See II Leg. Hist. of LMRA 1511, 1108 (1947). The second is that Section 8(b)(4) was generally thought, and intended, to prohibit union use of such pressures. See I Leg. Hist. LMRA 428 (1947) (Senate Report). In the House a proponent of the bill assured the doubters: "H.R. 3020 outlaws the secondary boycott. Under its terms, employers and employees can no longer be caught in the middle between rival and grafting labor unions." I Leg. Hist. of LMRA 658 (1947).

And the second is that the neutral employer may be hurt just as badly by pressures generated in support of a primary employer as by those directed against him. It is the victim's neutrality which we conceive to be the central element of Congressional concern in this area.[13] Cambridge Carriers, in a sense, voluntarily placed itself in a position where it was exposed to labor strife. Delta and Bloomfield, and the companies with which they did business in New Orleans, were wholly outside the orbit of this conflict. They were neutral, both in terms of their interest in and of their

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Both the sponsors of the bill and its critics agreed that the effect of 8(b)(4) was to treat jurisdictional strikes and prototypic secondary boycotts alike. II Leg. Hist. of LMRA 1068, 1491 (1947). On this point there was virtually no disagreement:

> Section 8(b)(4) would add to the National Labor Relations Act a new section which would provide that various concerted activities of labor unions, such as secondary boycotts, jurisdictional disputes, and sympathy strikes, defined in broad terms, would be unfair labor practices which could be prohibited . . . .

II Leg. Hist. of LMRA 1047 (1947) (Remarks of Senator Murray).

[13] It is the person "wholly unconcerned" in the primary dispute that the Act is designed to protect. See *NLRB* v. *Business Mach. Mechanics Conference*, 228 F.2d 553 (2d Cir. 1955), *cert. denied*, 351 U.S. 962 (1956); *International Bhd. of Elec. Workers* v. *NLRB*, 181 F.2d 34 (2d Cir. 1950), *aff'd*, 341 U.S. 694 (1951). And the pressures from which he is to be protected are those that can be said to be significantly different in kind and intensity from the inconveniences a neutral employer inevitably experiences when someone with whom he is doing business is struck. See *Seafarers Int'l Union* v. *NLRB*, 105 U.S.App.D.C. 211, 217, 265 F.2d 585, 591 (1959). Here Delta and Bloomfield operated several hundred miles away from the source of NMU's complaints, and in all probability they would not have been affected by a strike of Cambridge Carriers. The dispute between NMU and SIU in no way touched them until NMU began picketing in New Orleans. Moreover, not only were Delta and Bloomfield "neutral" in theory, but they were incapable in fact of satisfying NMU's demands. Compare *Local 5, United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Indus.* v. *NLRB*, 116 U.S. App. D.C. 100, 105, 321 F.2d 366, 371, *cert. denied*, 375 U.S. 921 (1963) See generally Lesnick, The Gravamen of the Secondary Boycott, 62 COLUM. L. REV. 1363 (1962).

capacity to satisfy NMU's purposes. We believe the Board fairly read Section 8(b)(4)(i) and (ii)(B) as an expression of a Congressional purpose not to permit NMU to force a suspension of business relationships in New Orleans because of its dissatisfaction with a similar suspenson which disadvantaged its members and their employer in Philadelphia.[14]

Whatever the meaning of *Douds* v. *International Longshoremen's Ass'n, supra,* may be, we are not impelled to reach a different result here because of it. It seems to say that if the ultimate objective is not prohibited by statute, an intermediate step in pursuit of that goal is not to be treated as illegal even though the statute, in both letter and spirit, appears to make it so. This is the kind of ratiocination more likely to be encountered in a reversal of criminal contempt convictions, as *Douds* was, than in less dramatic reviews of Board orders, which perhaps accounts for the fact that the Second Circuit, in the ten years since that decision, apparently had no further occasion to refer to it until very recently. In any event, the Second Circuit has itself now removed this obstacle, at least so far as concerns the set of facts immediately before us. The three judges of that court who granted enforcement of the Board's orders in the two related proceedings that grew

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[14] At least two other circuits have taken the position that a dispute with a primary employer is not a prerequisite to the commission of the unfair labor practice forbidden by Section 8(b)(4), and no case that we have found has held that it is. Most recently, in *NLRB* v. *Local 751, United Bhd. of Carpenters,* 285 F.2d 633, 639 (9th Cir. 1960), the Ninth Circuit declared:

> But where the facts otherwise establish a secondary boycott practice violative of section 8(b)(4)(A) *it is immaterial whether the union is engaged in a labor dispute with a primary employer.* [Emphasis added.]

See also *NLRB* v. *Local 11, United Bhd. of Carpenters,* 242 F.2d 932, 935 (6th Cir. 1957); *NLRB* v. *Washington-Oregon Shingle Weavers' Council,* 211 F.2d 149, 152 (9th Cir. 1954).

out of NMU's picketing in Houston, Galveston, and Philadelphia, see note 2 *supra*, had no difficulty distinguishing *Douds*. In so doing they pointed out that the application of that case argued for there, and here, by NMU was "at odds with" the language of the statute, the authoritative construction of that language by the Supreme Court, and the overwhelming weight of authority in other circuits.[15]

In *Amalgamated Meat Cutters* v. *NLRB*, 99 U. S. App. D. C. 24, 29, 237 F.2d 20, 25 (1956), *cert. denied*, 352 U. S. 1015 (1957), we were confronted with this same argument derived from the dichotomy of an assertedly legal ultimate objective, on the one hand, and an intermediate illegal purpose, on the other. In sustaining the Board order under Section 8(b)(4)(A), we said that the legality of the ultimate goal "does not insulate the Union's actions where the Board finds on sufficient evidence, as here, that such ultimate object is sought by prohibited means. A finding of an illegal intermediate object is all that is required." Thus, even though NMU's ultimate interest here be taken to be the innocent one of protecting its agreements from embarrassments of the kind caused by SIU's picketing of the *Maximus* in Philadelphia, it could not seek to secure that interest through the illegal intermediate activity of closing down the operations of neutral employers in New Orleans.

## V

NMU's third line of attack on the Board's order derives from the First Amendment. It reiterates NMU's claim before the Board that the only purpose of the picketing

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[15] See *National Maritime Union* v. *NLRB*, *supra* notes 2, 7. The court enumerated several differences, in addition to those we have suggested, that warranted its ignoring its earlier decision. It pointed out that the factual circumstances in *Douds* had all the complexities of the much disputed "situs" cases, that the employees involved were at the time unrepresented and collective bargaining had therefore come to a stand-still, and that the activities in dispute all took place within a relatively small area.

was to convey to SIU crew members the information that their fellows in Philadelphia were engaged in reprehensible conduct. Thus, so goes the argument, if NMU may not effectuate this purpose by appropriate means, such as displaying signs setting forth this information, its constitutional rights of free speech are infringed. The Board, however, upon all the evidence before it, found NMU's purpose to be not simply to inform but to close down all operations by inducing all persons to refrain from crossing the picket line. This finding rested upon substantial evidence beyond that of the mere carrying of the signs as a "signal," and we need not view the case as presenting the free speech issue on that basis alone.

The Supreme Court has been careful to protect the area provided by Congress for peaceful picketing against unconstitutional encroachment. See *NLRB* v. *Fruit and Vegetable Packers*, 377 U. S. 58 (1964). But conduct, including picketing, that is calculated to produce the secondary pressures forbidden by Section 8(b)(4) is not protected by the First Amendment. *International Bhd. of Elec. Workers* v. *NLRB*, 341 U. S. 694 (1951); and see *Truck Drivers and Helpers Local 728* v. *NLRB*, 101 U. S. App. D. C. 420, 249 F.2d 512, (1957), *cert. denied*, 355 U. S. 958 (1958).[16]

The petition is denied; and the Board's request for enforcement is granted.

It is so ordered.

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[16] NMU made the same argument to the Second Circuit that it makes to us. It found that court no more receptive than are we, for its contention was dismissed with a citation of the Supreme Court's decision in the *Electrical Workers* case and the following brief statement: "[W]e find that there is no substance to the petitioner's claim that its rights under the First Amendment to the Federal Constitution have been impaired."

## Order Amending Opinion.

It is ORDERED, *sua sponte*, that the opinion filed April 15, 1965, in the above-entitled case is amended as follows:

On page 2, the first sentence of Part I should read:

> "The SS. *Maximus*, while owned and operated by the Grace Line, was manned in part by members of the Marine Engineers' Beneficial Association (MEBA)."

On page 2, line 10 of Part I, delete "SIU" and substitute in lieu thereof "MEBA."

On page 2, change footnote 1 to read:

> "[1] The employees in question appear to be marine engine-room officer personnel, and the union organizations immediately involved are MEBA and the Brotherhood of Marine Officers, an affiliate of NMU. For convenience in respect of the latter, reference throughout are to NMU, which was immediately responsible for the conduct found by the Board to be an unfair labor practice. For its part, MEBA appears to have had an ally in the Seafarers International Union (SIU)."

On page 3, lines 7 and 13, substitute "MEBA" for "SIU."

On page 3, line 15, delete "(SIU)."

On page 4, line 5, substitute "MEBA" for "SIU."

On page 5, line 16, delete "(SIU)."

On page 5, line 2 and 6 of Part II, substitute "MEBA" for "SIU."

On page 6, line 3 of footnote 4, substitute "MEBA" for "SIU."

On page 14, line 8, substitute "MEBA" for "SIU."

On page 15, line 4, substitute "MEBA" for "SIU."

On page 16, line 16 of footnote 13, after "SIU" add "and MEBA."

On page 18, line 18, substitute "MEBA's" for "SIU's."

On page 18, line 26, substitute "MEBA" for "SIU."

Dated: May 19, 1965.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965.

No. 403

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

*Petitioner,*

*against*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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IN THE

# Supreme Court of the United States

OCTOBER TERM 1965

No. .....

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
*Petitioner,*

*against*

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, National Maritime Union of America, AFL-CIO, prays that a Writ of Certiorari be issued to review the Decree of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled case on May 5, 1965.

### Opinions Below.

The Decision and Order of the National Labor Relations Board and Trial Examiner's decision, printed as part of the Joint Appendix in the Court below, nine copies of which are submitted herewith, is reported in 147 NLRB No. 147

(1964). The Opinion of the United States Court of Appeals for the District of Columbia Circuit, printed as Appendix B hereto, is reported in F.2d (D.C. Cir. 1965). The decree of the United States Court of Appeals for the District of Columbia Circuit is printed as Appendix C hereto.[1]

## Jurisdiction.

The Decree of the United States Court of Appeals for the District of Columbia Circuit was entered on May 5, 1965, (Appendix C). The Petition for Rehearing was denied on May 14, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

## Questions Presented.

(1) Does the National Labor Relations Board have jurisdiction to convict a labor union of an unfair labor practice where there is no *labor dispute* as defined in the National Labor Relations Act?

(2) Does the National Labor Relations Board have jurisdiction to issue a complaint charging a *secondary* boycott under Section 8(b)(4) of the National Labor Relations Act where there is no dispute with a *primary* employer?

## Statutes Involved.

The statutory provisions involved are the National Labor Relations Act, as amended, Sections 2(9), 8(b)(4)(i)(ii)(B) and 10(f), 29 U.S.C.A. 152(9), 158(b)(4)(i)(ii)(B), and 160(f).

---

[1] The conflicting decision of the United States Court of Appeals for the Second Circuit in *National Maritime Union of America* vs. *NLRB*, reported in F.2d (2d Cir. 1965, 29067 and 29068) arising out of the same dispute is printed as Appendix D hereto.

## Statement of the Case.

On June 10, 1963, the S.S. *Maximus* arrived in the Port of Philadelphia to load Red Cross supplies destined for Cuba in exchange for survivors of the Bay of Pigs invasion. The vessel recently had been acquired by a newly formed company, Cambridge Carriers, Inc., which had entered into collective bargaining agreements with the National Maritime Union of America (NMU) for its unlicensed personnel and the Brotherhood of Marine Officers (BMO) for its licensed deck and engine room officers.

Prior to the acquisition by Cambridge Carriers, the vessel had been owned by Grace Line, Inc. at which time her *licensed* marine engineers were represented by the Marine Engineers Beneficial Association (MEBA) and the unlicensed personnel were represented by NMU. Upon the arrival of the *Maximus* in Philadelphia, MEBA immediately commenced picketing the ship in order to force Cambridge Carriers out of business unless it terminated its contract for the licensed engineers with BMO and signed with MEBA. The unlicensed men aboard the vessel, represented by NMU, were caught in the middle of this dispute and were in danger of losing their jobs if the *Maximus* continued to be immobilized because of the MEBA picketing.

Cambridge Carriers immediately filed unfair labor practice charges against MEBA, but the National Labor Relations Board refused to issue a complaint on the ground that MEBA members, being licensed officers, were supervisory personnel, and, therefore, outside the jurisdiction of the National Labor Relations Act.

With the vessel immobilized and the unlicensed personnel represented by NMU in danger of losing their jobs, NMU began to picket MEBA engineers wherever they could be found on other ships, protesting the illegal picketing of the *Maximus*. The picket signs stated:

INFORMATIONAL PICKETING
MEBA ENGINEERS
INTERFERE WITH
EMPLOYER WHO
LAWFULLY RECOGNIZES N.M.U.

This publicity effort was directed to MEBA members in the Port of New Orleans, as well as in the Port of Philadelphia and in the Houston-Galveston area to the end that they would call upon their union leaders to stop the picketing of the *Maximus* which, while obviously improper, was beyond the reach of the National Labor Relations Board.

In New Orleans the picketing commenced on June 17, 1963, and was directed to the MEBA engineers aboard the S.S. *Del Valle* and S.S. *Del Mar* of Delta Steamship Company, and aboard the S.S. *Neva West* owned by Bloomfield Steamship Company. The picketing terminated three days later on June 20, 1963 when MEBA stopped picketing the *Maximus* in Philadelphia. The picketing admittedly was conducted in a peaceful manner at all times.

Following the filing of unfair labor practice charges by Delta and Bloomfield, the National Labor Relations Board issued a complaint alleging that NMU's picketing of the MEBA engineers constituted a secondary boycott in violation of Section 8(b)(4)(i)(ii)(B) of the Act. After a full hearing the Trial Examiner made findings and rendered a carefully reasoned opinion holding that the complaint against NMU should be dismissed. The Trial Examiner found that there was no dispute between NMU and either Delta or Bloomfield. On the contrary, he found that the dispute was solely between NMU and MEBA. Noting that the case was one of first impression, he framed the issue as hinging on the construction to be given the statute by the Board—"whether it gives generous scope to the language of Section 8(b)(4)(B) in the interest of furthering the policies of the Act, or exercises restraint in the interest of protecting freedom of persons to engage in conduct not specifically prohibited." Recognizing that this Court has in the past rejected the Board's attempts to expand its jurisdiction, the Trial Examiner pointed out that none of the cases cited by the Board dealt with the type of situation involved here—namely, a dispute with another union rather than a dispute with a primary employer—and that the only decisional authority was that of the Second

Circuit in *Douds* v. *International Longshoremen's Association*, 224 F.2d 455, *cert. denied*, 350 U.S. 873 (1955), which held that such picketing was *not* in violation of the statute. After an extensive consideration of the *Douds* decision, he concluded that the case against NMU here was even weaker than that presented against the union in the *Douds* case.[2]

The Board, however, reversed the Trial Examiner. In so doing, it recognized that its decision was in conflict with the decision of the Court of Appeals for the Second Circuit in *Douds* vs. *International Longshoremen's Association*, supra, but refused to follow that case. The Board also expressly refused to follow the decision of the Court of Appeals for the Fourth Circuit in *NLRB* vs. *International Longshoremen's Association* (*Tulse Hill*), 332 F.2d 992 (1964), which holds that a labor dispute as defined in Section 2(9) of the National Labor Relations Act, which does not include disputes between unions as in the instant case, is an indispensable prerequisite to NLRB jurisdiction.

The Court of Appeals for the District of Columbia Circuit, in affirming the Board, incorrectly assumed that MEBA was a subsidiary of the Seafarers' International Union (SIU), a union of *unlicensed* seamen, and that SIU was the real party to the controversy. This error is of substantial significance, for if SIU had been involved the Board would have been able to stop the picketing of the *Maximus* thereby making unnecessary NMU's protective picketing. The lower court's subsequent attempt to correct its opinion by merely substituting MEBA for SIU wherever it appears in the opinion, serves only to compound this error as it is clear that the court was thinking of two competing *unlicensed* unions in its original opinion, and this error in reasoning, with its suggestion of a jurisdictional dispute, remains despite the substitution of MEBA for SIU.

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[2] The Trial Examiner also found that if the rules applicable to common situs picketing were to be applied by analogy in the instant case, the NMU picketing would fall within the area of permitted activity under the *Moore Drydock* decision.

The Court below flatly rejected the holding of the Court of Appeals for the Fourth Circuit in *NLRB* vs. *International Longshoremen's Association* (*Tulse Hill*), supra, that a "labor dispute," as defined in Section 2(9) of the Act, was a necessary prerequisite to NLRB jurisdiction to issue a complaint. In rejecting the *Tulse Hill* decision, the Court below specifically held that the Board's power to act under Section 8(b)(4)(i)(ii)(B) did not depend upon the existence of a labor dispute. On this same point, the Court below is in direct conflict with the decision of the Second Circuit Court of Appeals in this same controversy growing out of the NMU picketing of MEBA engineers in Philadelphia, Houston and Galveston. The Second Circuit held that the existence of a labor dispute was essential to Board jurisdiction, but adopted the definition of a labor dispute contained in the Norris-LaGuardia Act, rather than that in the National Labor Relations Act.

Finally, the Court below also expressly refused to follow the Second Circuit's decision in *Douds* v. *International Longshoremen's Association*, supra, which holds that there can be no secondary boycott in the absence of a dispute with a primary employer. Instead, the lower Court held that Section 8(b)(4)(i)(ii)(B) was applicable whenever picketing injured so-called "neutral" employers.

Petitioner herein seeks review of the decision of the Court below on two basic grounds: First, because of the clear conflict with the decision of the Court of Appeals for the Fourth Circuit in *NLRB* vs. *International Longshoremen's Association* (*Tulse Hill*), supra, and the decision of the Second Circuit Court of Appeals arising out of this same dispute, both of which held that a "labor dispute" was an indispensable prerequisite to an unfair labor practice charge; and, second, because of the conflict with the decision of the Second Circuit Court of Appeals in *Douds* vs. *International Longshoremen's Association*, supra, holding that the absence of a dispute with a primary employer effectively bars any charge of secondary boycott under Section 8(b)(4).

## REASONS FOR GRANTING THE WRIT.

### I.

**The holding of the Court Below that Section 8(b)(4) of the Act could be applied to situations not involving a "labor dispute" is in conflict with the decision of the Court of Appeals for the Fourth Circuit in *NLRB* vs. *International Longshoremen's Association (Tulse Hill)*, 332 F. 2d 992, and with the decision of the Court of Appeals for the Second Circuit in *National Maritime Union* vs. *NLRB*, F.2d .**

In *NLRB* v. *International Longshoremen's Association (Tulse Hill)*, 332 F.2d 992 (1964), the Court of Appeals for the Fourth Circuit flatly rejected an attempt by the National Labor Relations Board to extend its jurisdiction to controversies which did not constitute labor disputes as defined in Section 2(9) of the National Labor Relations Act. There, the International Longshoremen's Association had refused to refer longshoremen to Maryland Ship Ceiling Co., a stevedore, for work aboard the *Tulse Hill*, a vessel which had been engaged in trade with Communist Cuba. In reversing the Board's assumption of jurisdiction, the Court of Appeals for the Fourth Circuit stated (at p. 995):

> "The more important attack on the Board's jurisdiction is that we have here no 'labor dispute' as the law defines it. Beyond doubt the National Labor Relations Act, as amended, is designed 'to regulate the conduct of people engaged in labor disputes.' *Marine Cooks & Stewards* vs. *Panama S.S. Co.*, 362 U.S. 365, 372, 45 LRRM 3118 (1960). The Act is replete with references to the term 'labor dispute' and Section 2(9) provides a definition of this phrase.
>
> "(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of

employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relations of employer and employee." 29 U.S.C.A. §152(9).

"The Act has been interpreted as conferring Board jurisdiction over a variety of labor matters, *but there can be no jurisdiction where the complaint presents a controversy unrelated to the resolution of a 'labor dispute' as defined.* We think that this is the case here." (Emphasis supplied.)

In the instant cases, the evidence is clear beyond any doubt, and the Board so found, that NMU did not have a dispute with any employer. Moreover, NMU was not engaged in any controversy concerning terms or conditions of employment and was not seeking to gain recognition as the representative of any employees. The sole purpose of the NMU picketing was to bring a message to MEBA members about what their union was doing to the *Maximus* and the effect of this picketing on the NMU crew. This action by NMU did not fall within the Section 2(9) definition of a labor dispute. Accordingly, the Court's reasoning in the *Tulse Hill* case, supra, is equally applicable here (332 F.2d 996):

"The point relied on by ILA is not merely the absence of a labor dispute with a primary employer, as the Board's opinion states. The point is rather the absence of any 'labor dispute' as the statute defines it, namely, a dispute concerning 'terms or conditions of employment' . . . The existence of a 'labor dispute,' *the indispensable prerequisite to jurisdiction, is simply assumed by the Board. Implied in the Board's pronouncement is the notion that whenever a union calls a work stoppage or refuses to supply labor there is a 'labor dispute.'* We cannot accept this view." (Emphasis supplied.)

The Board had before it three cases involving the NMU picketing of the MEBA engineers. In its opinions in each of these three cases the Board's treatment of the *Tulse Hill* decision shows a remarkable pattern of inconsistency. In the Philadelphia case, 147 NLRB No. 144, the Board simply refused to follow the Fourth Circuit's views *"until such time as the issue is finally resolved by the Supreme Court"* (J. App., Page 86, Note 3). In the Houston-Galveston decision, 147 NLRB No. 142, the Board attempted to bridge the gap in its statutory jurisdiction by merely noting there was an "underlying labor dispute" involved (J. App., Page 114, Note 9), although here too the Board apparently recognized that this "underlying" dispute did not fit the Section 2(9) definition. In the third, the instant case, the Board disregarded the Fourth Circuit's decision by merely noting, in a footnote, that the *Tulse Hill* case was reversed "on other grounds" than the jurisdictional issue. (J. App., Page 6, Note 11). The *Tulse Hill* decision, however, permits no such interpretation. There, having expressly decided that the Board lacked jurisdiction for want of a labor dispute, the Fourth Circuit, on the assumption that the Board would petition for a Writ of Certiorari, also decided the merits of the case to aid this Court in the event further review was granted. The conclusion of the Court below that the finding on the merits in the *Tulse Hill* case "watered down" the basic jurisdictional finding is, therefore, without foundation. The strong and unequivocal language of the Fourth Circuit on the jurisdiction issue in the *Tulse Hill* case decisively demonstrates that this was the basis for its refusal to grant enforcement, in direct refutation of the lower Court's conclusion. The Board's failure to seek a Writ of Certiorari in the *Tulse Hill* case, coupled with the lower Court's refusal to follow the Fourth Circuit's decision in the instant case, serves only to highlight the necessity for this Court to grant certiorari and resolve this question.

The decision below also is in conflict with the decision of the Second Circuit Court of Appeals in the related case dealing with the NMU picketing of MEBA engineers in

other cities. The Second Circuit held that a "labor dispute" *was* necessary to Board jurisdiction, but adopted the definition of a labor dispute applied in cases arising under the Norris-LaGuardia Act, 28 U.S.C. §101 *et seq.* The holding of the Court below, however, directly to the contrary, is that no labor dispute at all is necessary to Board jurisdiction. Thus, although the Fourth and Second Circuits disagree on which definition is applicable, both agree that a labor dispute *is* necessary to Board jurisdiction. The Court below thus is in disagreement with both the Fourth and Second Circuits on this vital issue. Accordingly, certiorari should be granted under these circumstances to resolve this conflict between the Circuits.

## II.

**The Court below further expanded the Board's jurisdiction by applying the secondary boycott provisions of the Act where no dispute existed with a primary employer thus coming into conflict with the Court of Appeals for the Second Circuit in *Douds* v. *International Longshoremen's Association*, 224 F. 2d 455. In so holding and declaring the NMU picketing illegal the Court below also violated this Court's decision in *NLRB* v. *Fruit & Vegetable Packers*, 377 U. S. 58, which holds that the N.L.R.A.'s restrictions on peaceful picketing are to be limited to those situations which were specifically considered by Congress.**

On numerous occasions this Court has noted that Congress, in enacting Section 8(b)(4) of the Act, intended to preserve the right of unions to engage in peaceful picketing except in certain specifically considered situations. Section 8(b)(4) has been referred to as "one of the most labyrinthine provisions ever included in a federal statute."[3]

[3] Aaron, "The Labor-Management Reporting and Disclosure Act of 1959" (Pt. 2), 73 Harv. L. Rev. 1086, 1113 (1960).

Literally interpreted, it would bar all picketing, primary as well as secondary, and including constitutionally protected picketing. See *Local 761* vs. *NLRB*, 366 U.S. 667, 672 (1961). However, consistent with the legislative history, this Court has given Section 8(b)(4)(i)(ii)(B) a narrow construction. Thus, in the recent case of *NLRB* v. *Fruit and Vegetable Packers*, 377 U. S. 58 (1964), the Court stated:

> "Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable. 'In the sensitive area of peaceful picketing Congress has dealt explicitly with isolated evils which experience has established flow from such picketing.' *Labor Board* v. *Drivers Local Union*, 362, U.S. 274, 284 e L ed 2d 710, 718, 80 S. Ct. 706. *We have recognized this congressional practice and have not ascribed to Congress a purpose to outlaw peaceful picketing unless 'there is the clearest indication in the legislative history,' ibid.*, that Congress intended to do so as regards the particular ends of the picketing under review. Both the congressional policy and our adherence to this principle of interpretation reflect concern that a board ban against peaceful picketing might collide with the guarantees of the First Amendment." (Emphasis supplied.)

Reference to the legislative history of the secondary boycott provisions reveals that Congressional attention was focused only on disputes involving unions and employers, and on efforts by unions to enlist the support of neutral employers to further their causes in disputes with primary employers. The legislative history is replete with references showing that a primary employer is a necessary prerequisite to a secondary boycott charge, and nowhere is there even the slightest suggestion that Section 8(b)(4)(i)(ii)(B) was to apply in situations where no primary employer was involved. Thus, Senator Goldwater, one of

the leading proponents of a broad prohibition of secondary activity, in the course of the discussions in the Senate on the proposed amendments to Section 8(b)(4), introduced a glossary of terms to be used in the debate. The following definition of "secondary employer" was adopted without objection:

> "Secondary employer." He is the employer who does business with the *primary* employer that is engaged in a labor dispute." 2 Leg. Hist. 1389. (Emphasis supplied)

Similarly, Senator McClellan in discussing the proposed legislation stated:

> "This bill would amend Section 8(b)(4) of the Taft-Hartley Act to prohibit certain types of coercion of the employer, and particularly, to prevent coercion by picketing at the premises of the secondary employer in order to prevent customers from doing business with the employer *primarily involved in a labor dispute.*" 2 Leg. Hist. 1007. (Emphasis supplied)

Many other congressmen spoke on this legislation and described the type of conduct to which it applied. In every instance, the illustration referred to a dispute involving a primary employer.[4]

Considering the extensive legislative history available, one would certainly expect to find at least some reference to the possible application of Section 8(b)(4)(i)(ii)(B) of the Act to disputes not involving a primary employer, if, in fact, Congress intended that it be so applied. The complete absence of any such reference in the legislative

[4] See 2 Leg. Hist. 994 (Statement of Secretary of Labor Mitchell introduced into Cong. Record); 2 Leg. Hist. 1079, 1303 (Statement of Senator Goldwater); 2 Leg. Hist. 1193, 1194, 1196 (Statement of Senator McClellan); 2 Leg. Hist. 1470 (Statement of Rep. LaFore); 2 Leg. Hist. 1519 (Statement of Rep. Landrum); 2 Leg. Hist. 1523 (Statement of Rep. Griffin); 2 Leg. Hist. 1526 (Statement of Rep. Hoffman); 2 Leg. Hist. 1580 (Statement of Rep. Rhodes.)

history is a clear and positive indication that Congress did not contemplate that Section 8(b)(4)(i)(ii)(B) would be so interpreted. In light of this legislative background, due regard for the admonition in *NLRB* v. *Fruit and Vegetable Packers,* supra, that peaceful picketing is not to be outlawed unless "there is the clearest indication in the legislative history," compels the conclusion that Section 8(b)(4) applies only where a primary employer is involved in a labor dispute.

There is nothing new in the contention that a dispute with a primary employer is a *sine qua non* to a secondary boycott. The specific question was squarely met in *Douds* v. *International Longshoremen's Association,* 224 F.2d 455 (2nd Cir.), *cert. denied,* 350 U.S. 873 (1955), under strikingly analogous circumstances, an inter-union dispute on the New York waterfront. There, one union, in retaliation for picketing by a rival union, refused to handle goods that were delivered by a third union because the third union had respected the rival's picket line. In finding that this conduct was ~~not~~ a violation of the Act, Judge Learned Hand stated (255 F.2d at 458-89):

> "We shall for the moment assume that whatever was a violation of §8(b)(4)(A), 29 U.S.C.A. §158(b)(4)(A), was disobedience of the order and address ourselves to whether the refusal was such a violation. It was not, we think, within the three most recent decisions of the Supreme Court construing the section. In the first place it was not a 'secondary boycott' in the usual meaning of that term; *for that presupposes a labor dispute between the employees of one employer, with whom another employer has business relations, as a customer, or as the source of his material, or the like.* It further presupposes that the employees of the second employer, wishing to make common cause with those of the first, strike, or threaten to strike, against their own employer, unless he will discontinue his relations with the first, by this means putting pressure

> on the first to come to terms with his own employees . . . In the case at bar it is true that the '807' drivers were in a different craft from the longshoremen, but the 'object' of the 'Independent's' refusal to serve their trucks was not to advance union solidarity, *but a move against '807' for taking part in the dispute between itself and the 'AFL-ILA.' If this was within the statute it means that a union may not advance its own cause in a dispute with another to gain representation, if the step it takes causes a cessation of business between its employer and a third person, or between two third persons. It is one thing to say that such interference is unlawful when its 'object' is the promotion unionism in general, and a very different thing to forbid such a sanction as part of the contest for control.* We start therefore with the premises that, if the section goes so far, it ought to appear very plainly in the text, and we *do not think that it does.''* (Emphasis supplied.)

In the instant case, the Trial Examiner in a well reasoned opinion, and on the authority of *Douds* v. *International Longshoremen's Association,* supra, held that the NMU picketing was perfectly legal and ruled that the complaint against NMU should be dismissed. The Board and the Court below refused to follow the Second Circuit's ruling in *Douds,* upon the excessively broad proposition that wherever ''neutrals'' are involved picketing by unions is proscribed, regardless of whether there is a dispute with a primary employer, and regardless of the fact that the ultimate objective of the picketing not only is legal and proper, but even may be desirable. Moreover, the lower Court's holding overlooks the fact that NMU itself was a neutral with its members in danger of losing their jobs because of the irresponsible picketing of the *Maximus* by MEBA. The lower Court's broad ban on picketing in this respect clearly falls outside the orbit of the legislative intention and jeopardizes the validity of the entire secondary boycott section because of the serious constitutional

implications inherent in such an all-inclusive ban on peaceful picketing. See *NLRB* v. *Fruit and Vegetable Packers,* supra. Accordingly, certiorari should be granted to resolve this conflict between the Second Circuit and the District of Columbia Circuit and to determine whether the decision below is in conflict with the holding of this Court in the *Fruit and Vegetable Packers* case.

## Conclusion.

The decision of the Court below, in holding that a "labor dispute" is unnecessary to an unfair labor practice charge, is in conflict with the decision of the Fourth Circuit in *NLRB* v. *International Longshoremen's Association* (*Tulse Hill*), and with the decision of the Second Circuit in *NMU* v. *National Labor Relations Board,* growing out of this same controversy. The lower Court's holding that a secondary boycott charge can be sustained without a primary employer being involved is in conflict with the Second Circuit's decision in *Douds* v. *International Longshoremen's Association,* and the broad ban placed on picketing conflicts with this Court's decision in *NLRB* v. *Fruit and Vegetable Packers.* Accordingly, certiorari should be granted to resolve these conflicts and to give effect to the Congressional intent.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
Counsel for Petitioner.

# APPENDIX A.

## Statutes.

NATIONAL LABOR RELATIONS ACT

§2. Definitions

(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

§8. Unfair Labor Practices.

(b) It shall be an unfair labor practice for a labor organization or its agents—

• • • • • •

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

• • • • • •

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been cer-

tified as the representative of such employees under the provisions of section 9:

* * * * * *

§10. Prevention of Unfair Labor Practices

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

# APPENDIX B.

## Opinion of the United States Court of Appeals, for the District of Columbia Circuit.

No. 18,789

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Petitioner,

*v.*

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition to Review and Cross-Petition for Enforcement of an Order of the National Labor Relations Board

Decided April 15, 1965

Before BAZELON, Chief Judge, and FAHY and MCGOWAN, Circuit Judges.

MCGOWAN, *Circuit Judge*: The National Maritime Union of America (NMU) has petitioned to set aside an order of the National Labor Relations Board holding it to be in violation of Section 8(b)(4)(i)(ii)(B) of the Labor-Management Relations Act, 61 Stat. 136 (1947), as amended, 29 U. S. C. §§151 *et seq.* The Board has requested enforcement. We are presented with a somewhat novel set of circumstances in which to define the reach of Congress' purpose to contain within narrow limits the industrial strife which, in the language of the legislative declaration of policy, "interferes with the normal flow of commerce"

to the detriment of the public interest. We conclude that what the Board has done here falls within the range of the statutory provisions having that purpose, and we grant enforcement of its order.

I

The S.S. *Maximus,* while owned and operated by the Grace Line, was manned by members of the Seafarers International Union (SIU). However, upon its sale by Grace to a new owner, Cambridge Carriers, these personnel were replaced by members of NMU with whom Cambridge Carriers had an existing collective bargaining agreement.[1] Shortly after this sale, the *Maximus* was in Philadelphia to load food and drugs for Cuba as part of the ransom of the Bay of Pigs prisoners. This activity was stopped from June 10 until June 20, 1963, when SIU representatives picketed the ship carrying signs charging Cambridge Carriers with being unfair to the members of that union formerly employed on the *Maximus.* While that ship was so idled, NMU made a retaliatory counter-move. This response took the form of NMU picketing of other ships in Philadelphia, in Houston and Galveston, Texas, and in New Orleans, manned by SIU members. The order before us relates only to the events in New Orleans;[2] and these events, in turn, relate to two steamship companies.

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[1] The employees in question appear to be marine engine-room officer personnel, and the union organizations immediately involved are the Marine Engineers' Beneficial Association, an affiliate of SIU, and the Brotherhood of Marine Officers, an affiliate of NMU. For convenience, we refer throughout to the parent unions.

[2] Unfair labor charges were filed against NMU in respect of its activities at the other ports. Board orders sustaining those charges were entered in respect of Philadelphia in one case and Houston and Galveston in another. NMU's petitions to review those orders have been dismissed, and the Board's cross-petitions for enforcement granted, by the Second Circuit. *National Maritime Union* v. *NLRB,* Nos. 29,067-68, March 5, 1965.

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Delta Steamship Lines, Inc., uses the Poydras Street wharf in New Orleans. Bloomfield Steamship Company uses the Cotton Warehouse wharf. Neither has contracts with NMU. Both have contracts with SIU. On June 17, 1963, NMU started picketing the ships of each, with signs bearing the legend: "Information picketing. MEBA [SIU] Engineers interfere with employers lawfully recognizing NMU."

In the case of Delta, one of its ships, the S.S. *Del Valle,* was in port at the time the picketing began. The longshoremen ordered by Delta on June 17 and 18 appeared on the dock but would not cross the picket line at the foot of the gangplank. At 1:00 P.M. on June 18, the *Del Valle* was moved away from the wharf to a general anchorage point, and the picketing stopped. Later that afternoon, another Delta ship, the S.S. *Del Mar,* arrived at the wharf. There being no pickets, the longshoremen ordered by Delta boarded the ship and began unloading it. The next morning the pickets reappeared, and the longshoremen would not cross the line. This same morning the *Del Valle* was brought back to the wharf but the longshore gangs ordered for it similarly observed the line. This continued until the afternoon of the 20th, at which time, the SIU picketing of the *Maximus* in Philadelphia having ended, the NMU picketing in New Orleans stopped.

Delta meanwhile had, on June 17, concluded that certain repairs needed to be made to the *Del Valle.* The work was awarded to two local companies unaffiliated with Delta. The general manager of one informed Delta, upon finding the picket line, that his men would not cross it. The shop superintendent of the other came to the wharf to take a part away for repair, but would not cross the line to remove the part. Delta's own carpenters and painters in New Orleans, after consultation with their union business agents, refused to come aboard to do their usual work on ships in port.

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Bloomfield had one ship, the *Neva West,* at its dock on June 17. As in the case of Delta, carpenters and longshoremen reporting upon order would not cross the picket line.[3] The pipefitter foreman of a local marine repair company, which had received an order from Bloomfield to do some work, upon asking permission of a picket to go aboard to make the repair, was told that he could not do so. On June 18, Bloomfield's vice president in New Orleans called NMU's port agent. The former represented that the *Neva West* required only a few hours work in order to clear the port, and that the delay was subjecting Bloomfield to losses it could not prevent. The NMU agent refused this request to call off the pickets, as he did a similar and more urgent request the next day. The agent purported to recognize the truth of Bloomfield's pleas that it had no apparent power to solve NMU's problems in Philadelphia, but he told the Bloomfield officer: "We want you to be good and mad . . . . I want you to call Paul Hall [the International President of SIU] and tell him to call off the MEBA [SIU] pickets on the *Maximus.*

II

NMU argued to the Board that its picketing was purely informational in character, designed solely to apprise SIU crew members on the ships in New Orleans of the arbi-

[3] An employer known as States Marine Corporation had been retained by Bloomfield to service its ships. States Marine customarily had fork lift operators working on the wharf. The NMU pickets first took up positions at a street intersection leading to the wharf. When the fork lift operators would not cross this picket line to get to their duties on the wharf, their representative suggested to the pickets that perhaps they were at the wrong place. One of the pickets left to make a telephone call and, upon returning, said: "We are not picketing the docks. We are picketing the ship to keep the longshoremen from going on." Thereupon the picket line was moved to the immediate vicinity of the ship, and the fork lift operators proceeded to their usual duties on the docks. States Marine's orders for carpenters and longshoremen were placed with T. Smith & Company, an independent stevedoring company.

trary conduct of their brethren in Philadelphia and thereby to generate a grass-roots insistence that this shadow be lifted from the fair name of SIU. The Board did not believe this claim to be borne out by the facts. Although accepting NMU's protestations that it had no quarrel with either Cambridge Carriers in Philadelphia, or Delta and Bloomfield in New Orleans, the Board found that the purpose of the New Orleans picketing was to close down and prevent all cargo handling and maintenance and repair operations on the ships in question. It found this purpose not only in the peculiar susceptibilities of all waterfront labor to the appearance of a picket line irrespective of what the signs say, but more concretely in the evidence of the particular picketing arrangements and the acts done and statements made by NMU personnel in connection with it. The Board translated these findings into the unfair labor practices banned by Section 8(b)(4)(i) and (ii)(B) of the Act. It considered that its findings established that NMU had fallen afoul of these provisions of the statute by having induced and encouraged individuals employed by Bloomfield, Delta, and the local stevedores and service contractors to refuse to perform work aboard the three ships, and by coercing and restraining those employers, all with the object of forcing or requiring such employers to cease doing business with each other.

The facts as found by the Board appear to us to be supported by substantial evidence in the record; and, indeed, NMU's contentions here are not founded upon any significant challenge to those findings.[4] We are also of

[4] NMU argues that the Board assumed the ultimate fact in issue (*i.e.*, NMU's purpose to shut down operations on the ships rather than merely to inform the SIU crewmen) by reliance upon inadmissible hearsay testimony. The questioned testimony is that of (1) the pipefitter foreman of Dixie Machine Metal and Welding Works, Inc., who related that a picket told him he could not go aboard the *Neva West* to pick up a part for repair and (2) the representative of the fork lift operators, who said he was told by a

the view that those facts fit within the contours of the language used by Congress in Section 8(b)(4)(i) and (ii)(B).[5] NMU argues to us, however, that the mere matching of fact to word does not automatically conclude the matter, and we do not reject that proposition out of hand in the case of this part of the Act. It has been vividly but accurately characterized as "one of the most labyrinthine provisions ever included in a federal labor statute"; and the Supreme Court has admonished that at least one of its component sections cannot be applied literally.[6] NMU suggests three reasons why the Board's order cannot stand:

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picket that the purpose of the picketing was to keep the longshoremen from going aboard the *Neva West*. The crux of the hearsay objection is that, since these pickets were unidentified, they could not be cross-examined. But these were NMU's own pickets, who numbered three and two, respectively, at the times in question, and no reason appears why they could not have been called to deny the statements if they had not in fact been made. Further, these statements were thought by the Board to be in keeping with the responses given by NMU's New Orleans representative to Bloomfield's pleas to remove the pickets; and we agree.

[5] Section 8(b)(4) makes it an unfair labor practice for a labor organization:

> (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in any industry affecting commerce, where in either case an object thereof is—
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> . . .
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . .

[6] Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1113 (1960); *Local 761, Int'l Union of Elec. Workers* v. *NLRB*, 366 U.S. 667, 672 (1961).

one is couched in jurisdictional terms; the second asserts that a proper construction of the statute excludes the conduct in question from its ban; and the third descries constitutional impediments to be overcome if the first two fail to command acceptance.

III

NMU first argues that the Board was without jurisdiction to entertain this unfair labor practice complaint because there was no "labor dispute," as that term is defined in Section 2(9) of the Act. But Section 2 is the "Definitions" section of the Act, reflecting a salutary technique of modern legislative draftsmanship whereby words and phrases used elsewhere in the statute in substantive contexts are given precise definition. Section 2 does not purport to define the Board's jurisdiction; and the term "labor dispute," which is defined in paragraph (9), does not appear at all in the part of the statute with which we are presently concerned, that is to say, Section 8(b)(4)(i) and (ii)(B). There are, of course, other sections of the Act in which "labor dispute" is an operative term, but nowhere in the Act is there an overriding declaration that none of its provisions apply unless there is a "labor dispute" as defined in Section 2(9).

The only authority cited by NMU in support of its jurisdictional point is *NLRB* v. *International Longshoremen's Ass'n,* 332 F.2d 992 (4th Cir. 1964). There the Board had found an unfair labor practice violative of Section 8(b)(4)(ii)(B) in the refusal of a union to supply men to load a British ship which had been engaged in the Cuban trade. At the time of the Cuban missile crisis in October, 1962, the union adopted a policy of refusing to load ships which had taken part in such trade, and the ship in question, the S.S. *Tulse Hill,* was named on the union's blacklist. Thus, upon the *Tulse Hill's* arrival at Baltimore in January, 1964, the union failed to respond to the request of Maryland Ship Ceiling Com-

pany, an independent stevedoring company, for gangs of carpenters to fit the ship for cargo. There was no picketing of the ship nor any other kind of interference with its operations.

The Board's jurisdiction was attacked on the ground, among others, that there was no "labor dispute" as defined in Section 2(9). With one judge dissenting, two members of the court accepted this argument. They appeared to regard the union activity complained of as political in character and, accordingly, as not within the purview of the Act. They justified this construction of the Act by saying that a "labor dispute" as defined in Section 2(9) relates to terms and conditions of employment, which the ideological differences before them did not, and by noting that the Act was passed, in the words of the Supreme Court, "to regulate the conduct of people engaged in labor disputes." *Marine Cooks & Stewards* v. *Panama S.S. Co.*, 362 U. S. 365, 372 (1960).

The court, however, did not think it the part of prudence to stand upon this finding of a complete lack of jurisdiction in the Board. Noting that it was "dealing with a case of first impression and one likely to be offered for a review on certiorari," it thought it appropriate to reach the merits as a hedge against the possibility that the Supreme Court might view the jurisdictional issue differently. And, reaching the merits, it denied enforcement on the ground that the facts as found by the Board did not add up to a violation of Section 8(b)(4)(ii)(B).

We think this decision not to rest upon the jurisdictional issue a highly prudential one. The resolution made of that issue was, as the court explicitly recognized, one of "first impression," and no direct authority could be adduced for it.[7] The quoted phrase of the Supreme Court appears

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[7] We note in passing that the Second Circuit, in deciding the two cases which are companions to this one, addressed itself to the question of whether a "labor dispute" existed. It concluded, on facts similar to those before us, that the controversy giving rise to the Board's orders was such a dispute, as defined by Section 2(9). See *National Maritime Union* v. *NLRB*, Nos. 29,067-68, March 5, 1965.

in a Norris-LaGuardia Act case, in which the Court was passing on the jurisdiction of a district court to enjoin a strike, not the jurisdiction of the Board to entertain a charge of an unfair labor practice. It is not our function to say whether the Fourth Circuit was right or wrong in its jurisdictional ruling in the *Tulse Hill* case. We note only that the same result in practical effect (namely, the relieving of the union from the burden of the Board's order) was reached on another basis; and we are not persuaded by the authority of that case to deny the existence of jurisdiction in this one. As the Fourth Circuit thought it wise to do, so do we move on to NMU's second contention that, even if the Board had jurisdiction, it erroneously appraised NMU's conduct as subject to the strictures of Section 8(b)(4)(i) and (ii)(B) of the Act.

## IV

NMU's argument essentially is that Congress in enacting Section 8(b)(4) was addressing itself to the matter of secondary boycotts; that the secondary boycott traditionally and necessarily entails the existence of a dispute with a primary employer; and that, since NMU had no quarrel with Cambridge Carriers in Philadelphia, the *sine qua non* of prohibited secondary activity in New Orleans was missing. It points to many passages in the legislative history where secondary boycotts are unquestionably referred to in this traditional sense.[8] And, as a decisional

[8] NMU directs us only to the legislative history of the Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519. But the Act's ban on secondary pressures first came into the law in 1947, in the Taft-Hartley Act, 61 Stat. 135 (Labor-Management Relations Act), and it is in the history of this earlier enactment that Congress' purpose must in the first instance be sought. That history suggests that many members of Congress frequently did indeed visualize the objectionable activities in terms of the popularly understood situation: The employees of employer A, with whom they have a dispute, bring pressure on the employees of employer B, a supplier or customer of A, to force B to terminate his dealings with A. See

precedent, it rests upon *Douds* v. *International Longshoremen's Ass'n*, 224 F. 2d 455 (2nd Cir.), *cert. denied*, 350 U. S. 873 (1955).[9]

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II Leg. Hist. of LMRA 1106 (1947). But the evil Congress sought to eradicate has never been so limited in its manifestations, which no doubt accounts for the breadth of its language. The House Report grouped together "sympathy strikes," "illegal boycotts" and "jurisdictional strikes" as having in common

> the characteristic that they do not arise out of any dispute between an employer and employees who engage in the activities, or, in most cases, between the employer and any of his employees. More often than not the employers are powerless to comply with demands giving rise to the activities, and many times they and their employees as well are the helpless victims of quarrels that do not concern them at all. . . .

1 Leg. Hist. of LMRA 314 (1947). The object of Section 8(b)(4) was to protect third persons who were *"wholly unconcerned in the disagreement* between an employer and his employees." II Leg. Hist. of LMRA 1106 (1947) (Remarks of Senator Taft). (Emphasis added.) See *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1951).

The legislative history of the 1959 amendments reflects this earlier understanding. The bills introduced in both houses were aimed at filling the "major loopholes" in the existing ban on secondary pressure, among them the use of "hot cargo" clauses in labor agreements, the legality of coercion of employers as distinct from their employees, and the failure of the Act, as interpreted, to reach inducement or coercion of individual employees of neutral employers. The amendments were not intended to change, but to reinforce, the 1947 prohibition. See II Leg. Hist. of LMRDA 1568 (1959) (Remarks of Representative Griffin). Congress' purpose, as earlier, was to protect *"genuinely neutral employers* and their employees" (emphasis added) who were not themselves involved in a dispute. And this purpose had the approval even of those members who regarded the final amendments as destructive of the rights of unions. See II Leg. Hist. of LMRDA 1577 (1959) (Analysis of Representatives Thompson and Udall).

[9] We cannot help but note NMU's conspicuous lack of interest in the *Tulse Hill* decision as a possible precedent on the merits as distinct from jurisdiction. The reason, we think, is not far to seek. The Board's theory of the Section 8(b)(4)(ii)(B) violation in that case was that the prohibited coercion was directed against Maryland Ship Ceiling Company with the object of preventing or terminating business relations between it and the owners of the *Tulse Hill*. The Fourth

*Appendix B.*

Although the term "secondary boycott" has been widely used as a convenient short-hand reference to the conduct forbidden by Section 8(b)(4), the phrase nowhere appears in that section or, indeed, anywhere else in the Act. Certain acts, when done for a specified object, are proscribed. The mere fact that the language of this Section comprehends the familiar patterns of a secondary boycott in the customary sense does not inexorably dictate the conclusion that it excludes all variations from those patterns. Where, as here, act and object fall comfortably within the letter of the statute, the Board's hand is to be stayed only upon a persuasive showing that they are beyond its spirit.

NMU has not convinced us that they are. The legislative history of so controversial a statute as this tends to

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Circuit concluded, however, that the only circumstance found to be coercive was the simple withholding by the union of its labor. The union had not picketed or struck Maryland Ship or tried to prevent it from obtaining labor elsewhere; it "took no other measures." The court ruled that the Board's order should not be enforced because the "bare refusal to work in the circumstances shown" could not reasonably "be construed as [the] 'threats,' 'coercion,' or 'restraint'" referred to in the Act. But it added this significant comment (332 F.2d at 997):

> *While it might conceivably be an unfair labor practice* for the union to institute a general work stoppage against Maryland Ship, no such extreme action has been resorted to here. [Emphasis supplied.]

Thus, on the very facts presented in the case before us, namely, the picketing and related activities designed to prevent anyone from working on the ships, the Fourth Circuit in terms contemplated the possibility that an unfair labor practice could be said to have occurred —and this despite the absence of a dispute between anyone over wages or the other terms and conditions of employment which are the familiar fare of labor-management strife. We think this comment goes far towards explaining NMU's relegation of the *Tulse Hill* case to the background once the jurisdictional bridge has been crossed. And, even if our conjectures on this score are unwarranted, we are left in no doubt by it that the course of conduct challenged in *Tulse Hill* was vastly different from that pursued by NMU here.

be a welter of assertion and counter-assertion from which some comfort may be taken by almost any proponent of a particular construction. We are entitled to interpret Section 8(b)(4) in the light of the Congressional declaration of purpose and policy "to promote the full flow of commerce" and "to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare." A "central legislative purpose," so we have recently said, was "to confine labor conflicts to the employer in whose labor relations the conflict had arisen, and to wall off the pressures generated by that conflict from unallied employers."[10] The legislative proceedings giving rise to Section 8(b)(4) make clear that Congress wished its proscriptions to be broad enough to realize this purpose.[11]

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[10] *Miami Newspaper Pressmen's Local 46* v. *NLRB*, 116 U. S. App. D. C. 192, 197, 322 F. 2d 405, 410 (1963). This statement was made in the context of our rejection of the claim that Section 8(b)(4) applies only to disturbances of the business relationships between primary and secondary employers. We made clear our reading of the statute as covering the forced suspension of commercial intercourse between secondary employers and other persons. The Supreme Court has characterized the legislative objectives as including the "shielding [of] unoffending employers and others from pressures in controversies not their own." *NLRB* v. *Denver Bldg. & Const. Trades Council*, 341 U. S. 675, 692 (1951).

[11] See note 8 *supra*. At one point during the Senate debates Senator Taft, responding to a question from an opponent of the bill, described the aim of the section in this way:

> All this provision of the bill does is to reverse the effect of the law as to secondary boycotts. It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and *never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice.*

II Leg. Hist. LMRA 1106 (1947). (Emphasis supplied.) Compare with this the assessment of 8(b)(4) by that same opponent, Senator Pepper:

In this framework, Cambridge Carriers is the employer with whom, and Philadelphia the place where, the trouble started. The occasion was the purchase by Cambridge Carriers of a ship which, prior to its sale, had been manned by SIU personnel. NMU now protests that it cannot be under the ban of the statute because, even if Cambridge Carriers is to be thought of as a "primary employer," NMU, representing its employees, had no quarrel with it and no occasion to put pressure upon it to do other than what it was already doing. The pressures it sought to mobilize in New Orleans, so it is said, were directed solely against SIU and not the primary employer. There are two answers to this. The first is that Congress clearly desired to protect neutral employers from the ramifying effects of inter-union, as well as union-employer, strife.[12]

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> The Committee bill outlaws all kinds of so-called secondary boycotts, *even when the objective of the boycott is to preserve wage and working condition gains already achieved* by collective bargaining, even if the objective be to solicit in a peaceful way the cooperation of other workers in defending the wage and working standards of a particular community of industry.

II Leg. Hist. LMRA 1108 (1947). (Emphasis supplied.)

[12] Two facts emerge quite clearly from the extensive legislative history of the 1947 act. The first is that there was near-unanimous agreement that secondary pressures in aid of inter-union jurisdictional disputes should be prohibited. President Truman in his message to Congress named these among the "certain unjustifiable practices" that the legislation should deal with, and throughout the debates the opponents of 8(b)(4) attacked the provision because it failed to distinguish between these and other assertedly unobjectionable uses of the boycott. See II Leg. Hist. of LMRA 1511, 1108 (1947). The second is that Section 8(b)(4) was generally thought, and intended, to prohibit union use of such pressures. See I Leg. Hist. LMRA 428 (1947) (Senate Report). In the House a proponent of the bill assured the doubters: "H.R. 3020 outlaws the secondary boycott. Under its terms, employers and employees can no longer be caught in the middle between rival and grafting labor unions." I Leg. Hist. of LMRA 658 (1947).

And the second is that the neutral employer may be hurt just as badly by pressures generated in support of a primary employer as by those directed against him. It is the victim's neutrality which we conceive to be the central element of Congressional concern in this area.[13] Cambridge Carriers, in a sense, voluntarily placed itself in a position where it was exposed to labor strife. Delta and Bloomfield, and the companies with which they did business in New Orleans, were wholly outside the orbit of this conflict. They were neutral, both in terms of their interest in and of their

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Both the sponsors of the bill and its critics agreed that the effect of 8(b)(4) was to treat jurisdictional strikes and prototypic secondary boycotts alike. II Leg. Hist. of LMRA 1068, 1491 (1947). On this point there was virtually no disagreement.

> Section 8(b)(4) would add to the National Labor Relations Act a new section which would provide that various concerted activities of labor unions, such as secondary boycotts, jurisdictional disputes, and sympathy strikes, defined in broad terms, would be unfair labor practices which could be prohibited . . . .

II Leg. Hist. of LMRA 1047 (1947) (Remarks of Senator Murray).

[13] It is the person "wholly unconcerned" in the primary dispute that the Act is designed to protect. See *NLRB* v. *Business Mach. Mechanics Conference*, 228 F.2d 553 (2d Cir. 1955), *cert. denied*, 351 U.S. 962 (1956); *International Bhd. of Elec. Workers* v. *NLRB*, 181 F.2d 34 (2d Cir. 1950), *aff'd*, 341 U.S. 694 (1951). And the pressures from which he is to be protected are those that can be said to be significantly different in kind and intensity from the inconveniences a neutral employer inevitably experiences when someone with whom he is doing business is struck. See *Seafarers Int'l Union* v. *NLRB*, 105 U.S.App.D.C. 211, 217, 265 F.2d 585, 591 (1959). Here Delta and Bloomfield operated several hundred miles away from the source of NMU's complaints, and in all probability they would not have been affected by a strike of Cambridge Carriers. The dispute between NMU and SIU in no way touched them until NMU began picketing in New Orleans. Moreover, not only were Delta and Bloomfield "neutral" in theory, but they were incapable in fact of satisfying NMU's demands. Compare *Local 5, United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Indus.* v. *NLRB*, 116 U.S. App. D.C. 100, 105, 321 F.2d 366, 371, *cert. denied*, 375 U.S. 921 (1963) See generally Lesnick, The Gravamen of the Secondary Boycott, 62 COLUM. L. REV. 1363 (1962).

capacity to satisfy NMU's purposes. We believe the Board fairly read Section 8(b)(4)(i) and (ii)(B) as an expression of a Congressional purpose not to permit NMU to force a suspension of business relationships in New Orleans because of its dissatisfaction with a similar suspenson which disadvantaged its members and their employer in Philadelphia.[14]

Whatever the meaning of *Douds* v. *International Longshoremen's Ass'n, supra,* may be, we are not impelled to reach a different result here because of it. It seems to say that if the ultimate objective is not prohibited by statute, an intermediate step in pursuit of that goal is not to be treated as illegal even though the statute, in both letter and spirit, appears to make it so. This is the kind of ratiocination more likely to be encountered in a reversal of criminal contempt convictions, as *Douds* was, than in less dramatic reviews of Board orders, which perhaps accounts for the fact that the Second Circuit, in the ten years since that decision, apparently had no further occasion to refer to it until very recently. In any event, the Second Circuit has itself now removed this obstacle, at least so far as concerns the set of facts immediately before us. The three judges of that court who granted enforcement of the Board's orders in the two related proceedings that grew

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[14] At least two other circuits have taken the position that a dispute with a primary employer is not a prerequisite to the commission of the unfair labor practice forbidden by Section 8(b)(4), and no case that we have found has held that it is. Most recently, in *NLRB* v. *Local 751, United Bhd. of Carpenters,* 285 F.2d 633, 639 (9th Cir. 1960), the Ninth Circuit declared:

> But where the facts otherwise establish a secondary boycott practice violative of section 8(b)(4)(A) *it is immaterial whether the union is engaged in a labor dispute with a primary employer.* [Emphasis added.]

See also *NLRB* v. *Local 11, United Bhd. of Carpenters,* 242 F.2d 932, 935 (6th Cir. 1957); *NLRB* v. *Washington-Oregon Shingle Weavers' Council,* 211 F.2d 149, 152 (9th Cir. 1954).

out of NMU's picketing in Houston, Galveston, and Philadelphia, see note 2 *supra*, had no difficulty distinguishing *Douds*. In so doing they pointed out that the application of that case argued for there, and here, by NMU was "at odds with" the language of the statute, the authoritative construction of that language by the Supreme Court, and the overwhelming weight of authority in other circuits.[15]

In *Amalgamated Meat Cutters* v. *NLRB*, 99 U. S. App. D. C. 24, 29, 237 F.2d 20, 25 (1956), *cert. denied*, 352 U. S. 1015 (1957), we were confronted with this same argument derived from the dichotomy of an assertedly legal ultimate objective, on the one hand, and an intermediate illegal purpose, on the other. In sustaining the Board order under Section 8(b)(4)(A), we said that the legality of the ultimate goal "does not insulate the Union's actions where the Board finds on sufficient evidence, as here, that such ultimate object is sought by prohibited means. A finding of an illegal intermediate object is all that is required." Thus, even though NMU's ultimate interest here be taken to be the innocent one of protecting its agreements from embarrassments of the kind caused by SIU's picketing of the *Maximus* in Philadelphia, it could not seek to secure that interest through the illegal intermediate activity of closing down the operations of neutral employers in New Orleans.

## V

NMU's third line of attack on the Board's order derives from the First Amendment. It reiterates NMU's claim before the Board that the only purpose of the picketing

[15] See *National Maritime Union* v. *NLRB*, *supra* notes 2, 7. The court enumerated several differences, in addition to those we have suggested, that warranted its ignoring its earlier decision. It pointed out that the factual circumstances in *Douds* had all the complexities of the much disputed "situs" cases, that the employees involved were at the time unrepresented and collective bargaining had therefore come to a stand-still, and that the activities in dispute all took place within a relatively small area.

was to convey to SIU crew members the information that their fellows in Philadelphia were engaged in reprehensible conduct. Thus, so goes the argument, if NMU may not effectuate this purpose by appropriate means, such as displaying signs setting forth this information, its constitutional rights of free speech are infringed. The Board, however, upon all the evidence before it, found NMU's purpose to be not simply to inform but to close down all operations by inducing all persons to refrain from crossing the picket line. This finding rested upon substantial evidence beyond that of the mere carrying of the signs as a "signal," and we need not view the case as presenting the free speech issue on that basis alone.

The Supreme Court has been careful to protect the area provided by Congress for peaceful picketing against unconstitutional encroachment. See *NLRB* v. *Fruit and Vegetable Packers,* 377 U. S. 58 (1964). But conduct, including picketing, that is calculated to produce the secondary pressures forbidden by Section 8(b)(4) is not protected by the First Amendment. *International Bhd. of Elec. Workers* v. *NLRB,* 341 U. S. 694 (1951); and see *Truck Drivers and Helpers Local 728* v. *NLRB,* 101 U. S. App. D. C. 420, 249 F.2d 512, (1957), *cert. denied,* 355 U. S. 958 (1958).[16]

The petition is denied; and the Board's request for enforcement is granted.

It is so ordered.

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[16] NMU made the same argument to the Second Circuit that it makes to us. It found that court no more receptive than are we, for its contention was dismissed with a citation of the Supreme Court's decision in the *Electrical Workers* case and the following brief statement: "[W]e find that there is no substance to the petitioner's claim that its rights under the First Amendment to the Federal Constitution have been impaired."

## Order Amending Opinion.

It is ORDERED, *sua sponte*, that the opinion filed April 15, 1965, in the above-entitled case is amended as follows:

On page 2, the first sentence of Part I should read:

> "The SS. *Maximus*, while owned and operated by the Grace Line, was manned in part by members of the Marine Engineers' Beneficial Association (MEBA)."

On page 2, line 10 of Part I, delete "SIU" and substitute in lieu thereof "MEBA."

On page 2, change footnote 1 to read:

> "[1] The employees in question appear to be marine engine-room officer personnel, and the union organizations immediately involved are MEBA and the Brotherhood of Marine Officers, an affiliate of NMU. For convenience in respect of the latter, reference throughout are to NMU, which was immediately responsible for the conduct found by the Board to be an unfair labor practice. For its part, MEBA appears to have had an ally in the Seafarers International Union (SIU)."

On page 3, lines 7 and 13, substitute "MEBA" for "SIU."

On page 3, line 15, delete "(SIU)."

On page 4, line 5, substitute "MEBA" for "SIU."

On page 5, line 16, delete "(SIU)."

On page 5, line 2 and 6 of Part II, substitute "MEBA" for "SIU."

On page 6, line 3 of footnote 4, substitute "MEBA" for "SIU."

On page 14, line 8, substitute "MEBA" for "SIU."

On page 15, line 4, substitute "MEBA" for "SIU."

On page 16, line 16 of footnote 13, after "SIU" add "and MEBA."

On page 18, line 18, substitute "MEBA's" for "SIU's."

On page 18, line 26, substitute "MEBA" for "SIU."

Dated: May 19, 1965.

## APPENDIX C.

### Decree.

[Same Title.]

Before:

Bazelon, Chief Judge, and Fahy and McGowan, Circuit Judges.

This Cause came on to be heard upon a petition of National Maritime Union of America, AFL-CIO, to review and set aside an order of the National Labor Relations Board issued against petitioner on June 30, 1964, and upon the cross-petition of the National Labor Relations Board to enforce such order. The Court heard argument of respective counsel on December 21, 1964, and has considered the briefs and transcript of record filed in this cause. On April 15, 1965, the Court being fully advised in the premises, handed down its decision denying the petition to review and granting enforcement of the Board's order.

On Consideration Whereof, it is hereby ordered, adjudged and decreed by the United States Court of Appeals for the District of Columbia Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that National Maritime Union of America, AFL-CIO, its officers, agents, and representatives abide by and perform the directions of the Board in said order contained.

/s/ David L. Bazelon,
Chief Judge, United States Court of Appeals for the District of Columbia Circuit.

/s/ Charles Fahy,
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit.

/s/ Carl McGowan,
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit.

# APPENDIX D.

## Opinion of the United States Court of Appeals, for the Second Circuit.

No. 234 and No. 235—September Term, 1964.

(Argued January 15, 1965. Decided March 5, 1965.)

Docket No. 29067 and Docket No. 29068

[SAME TITLE.]

Before:

SMITH, KAUFMAN and ANDERSON,
*Circuit Judges.*

ANDERSON, Circuit Judge:

On June 10, 1963 the SS. *Maximus*, owned by Cambridge Carriers, Inc., docked at Pier 84 South in Philadelphia. The vessel had been commissioned to take food and drugs to Cuba in exchange for prisoners. Although the Grace Line, from which Cambridge had acquired the vessel a short time before, had a contract with Marine Engineers Beneficial Association (hereinafter referred to as MEBA), an affiliate of Seafarers International Union (referred to as SIU), Cambridge had collective bargaining agreements with National Maritime Union (referred to as NMU) and employed, as engineers, members of NMU's affiliate, Brotherhood of Marine Officers (referred to as BMO).

Shortly after the SS. *Maximus* docked, MEBA picketed at Pier 84 and displayed placards describing Cambridge as unfair to MEBA engineers. At the same time a stevedoring company failed to order the necessary gangs, thus preventing the loading of the vessel's cargo and immobilizing her crew.

In retaliation NMU established picket lines at various piers in the ports of Philadelphia, Houston and Galveston

where there were docked ships which had MEBA members in their crews. The placards of the picketers bore the legend "Informational Picketing" and said, "MEBA Engineers Interfere With Lawfully Recognized N. M. U." In Philadelphia the NMU picketing commenced on June 14 at Pier 27 on the north side of which the Weyerhaeuser vessel *George S. Long,* manned by MEBA engineers, was moored. On June 19, the picketing was extended to cover the vessel *Portmar,* owned by Calmar Steamship Corporation, also manned by MEBA engineers, which was moored on the south side of Pier 27. Nacirema Operating Co., a corporation performing stevedoring services in Philadelphia for Calmar and Weyerhaeuser, and Hinkins Steamship Agency, Weyerhaeuser's agent for soliciting and receiving cargo, were unable to perform their duties because of the refusal of the longshoremen to cross the picket line which was on a public street across the entrances to the north and south sides of the pier. Hinkins asked that the picket lines be removed, but was told by one Jardine, the picket captain, and one Parisi, NMU's port agent, that the request was impossible. Previously, just before pickets were placed to cover the south side of the pier, Jardine had been asked by a clerk for Weyerhaeuser's cargo agent whether or not there was any objection to the company's receiving freight on the south side of the pier and Jardine said that there was. Pickets were thereupon placed there, and unloading operations ceased. Similarly, Calmar was unable to have its vessel *Portmar* discharged of cargo. When Calmar's agent asked Jardine to move the picket line so that the work could go forward, Jardine refused.

In Houston and Galveston similar work stoppages occurred as employees of the stevedoring companies refused to perform services. At Houston there were eight ships at the Navigation District wharves and eight ships at Long Reach docks. As a result of the picketing and while it lasted, no ships handled cargo and no work of any kind was done at the docks. NMU's port agent at Houston, one

McDowell, knew that the work stoppages resulted from picketing at that port; he so reported to NMU's headquarters in New York, and when, on June 20, 1963, the picketing ended in Philadelphia and he was so advised, McDowell said to reporters in Houston, "I have just called off my pickets, and as far as I am concerned the port can get back into operation."

At Galveston unloading of Delta Steamship Lines' vessel *Del Alba* at Pier 35 was discontinued on June 17, 1963 as soon as NMU commenced picketing the pier and the work stoppage continued during the two days the pier was picketed. The NMU had no dispute with any of the shipowners, stevedoring companies or other employers at any of the docks it picketed in Philadelphia, Houston or Galveston. On the surface, the NMU's object was informational—to appeal to the public and to the MEBA rank-and-file so that they would protest against the allegedly unlawful picketing of the *Maximus*. But NMU made no attempts in any of the three ports to publicize by mass communications its dispute with MEBA, nor was there picketing of MEBA's headquarters. Likewise, there was a failure to inform longshoremen that it would be permissible for them to cross the picket lines and no plan was instituted, despite requests, to alter the method of picketing in order to permit the work to resume. In fact, in all ports the leaflets distributed were addressed not alone to MEBA members, but to all union men, exhorting them to cooperate with NMU in fighting MEBA and warning the shipowners and stevedoring companies that if they were unable to "stand up to outfits that try to put pressure on them in a phony beef, then they're really going to be in trouble."

Upon the foregoing facts the National Labor Relations Board found that NMU had violated §8(b)(4)(i)(ii)(B), 29 U. S. C. §158(b)(4)(i)(ii)(B), by inducing and encouraging employees of Weyerhaeuser, Calmar, Hinkins and Nacirema and employees of certain Houston and Galveston stevedoring companies to refuse to perform services for

their employers and by threatening and coercing neutral employers with an object of forcing or requiring them to cease doing business with each other. The Board conceded that in each case NMU's ultimate object—protecting itself in a representation dispute with a rival union—was lawful. Under these circumstances, peaceful picketing directed solely at MEBA members and publicity directed at the unorganized public would have been beyond the purview of the statute. The Board concluded, however, that the immediate aim and purpose of the picketing was to exert economic pressure on the employers involved through cessation of business to compel them to cause MEBA to end the controversy on the *Maximus*, and hence the picketing was violative of §8(b)(4)(i)(ii)(B). In each case it ordered NMU to cease and desist from the unfair labor practices found and to post appropriate notices.

The petitioner asks for a review of these orders and a denial of enforcement on the grounds (1) that the controversy here does not constitute a "labor dispute" within the definition of those words in §2(9) of the Act, 29 U. S. C. §152(9), and that therefore the Board had no jurisdiction, (2) that because the real dispute here was with MEBA, another union, and there was no dispute with a "primary employer," there could be no "secondary boycott" within §8(b)(4), 29 U. S. C. §158(b)(4), and, (3) that the Board's order infringed NMU's right of free speech.

We are satisfied that the controversy with which this case is concerned is a "labor dispute" within the definition of §2(9). It is a controversy which concerns the association or representation of persons in maintaining terms or conditions of employment. It is true as the petitioner states that NMU had no quarrel at the time with Cambridge as the owner of SS. *Maximus* with whom NMU had a contract. It was, however, by affirmative action of its own, seeking to fend off or retaliate for picketing of the SS. *Maximus* by MEBA in their continuing warfare to gain or retain the upper hand in representing maritime employees.

Several employers and their employees were directly affected. Both the purposes of the Act and the definition of "labor dispute" are broad and encompass the factual circumstances here presented. The definition of "labor dispute" in this Act and in the Norris-LaGuardia Act, §13(c), 29 U. S. C. 113(c), are virtually identical. In *Milk Wagon Drivers' Union, Local No. 753* v. *Lake Valley Farm Products, Inc.*, 331 U. S. 91, 99-100 (1940), the Supreme Court said:

> "This merely transformed the defendants' activities from an effort to organize non-union men to a conflict which included a controversy between two unions. A controversy 'concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment' is expressly included within the definition of a labor dispute in the Norris-LaGuardia Act."

We see no reason why the same definition should be given a narrower construction or interpretation for the broad purposes of the Labor Management Relations Act. The petitioner advances as a reason for doing so that in the Norris-LaGuardia Act there are, in addition to the definition of "labor dispute" in §13(c), the provisions of §13(a) which describe the parties which must be implicated to constitute cases which "involve or grow out of a labor dispute." From this it argues that the absence of a provision in the Labor Management Relations Act, similar to §13(a) of the Norris-LaGuardia Act, compels the conclusion that the Board's jurisdiction under §2(9)—a provision which it claims is "narrower" in its scope than §13 of the Norris-LaGuardia Act, read in its entirety—does not extend to inter-union controversies. This argument is not persuasive. The effect of §13(a), though broad in itself, is to limit the cases which can be held to "involve or grow out of" a labor dispute. It does not change the definition of a labor dispute in the least. The Labor Management Relations Act contains

no such limitation. Moreover, in *Milk Wagon Drivers' Union* the Supreme Court did not concern itself with §13(a) for its interpretation of the definition of "labor dispute." *Matson Navigation Company* v. *Seafarers International Union*, 100 F. Supp. 730 (D. Md. 1951). It also appears that for the purpose of determining whether particular union activity is subject to §8(b)(4) of the National Labor Relations Act and that state jurisdiction over the matter is thereby displaced, no distinction is made between secondary activity which is a part of a controversy between a union and an employer or between two unions, *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959); *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468 (1955).

The character of the underlying dispute in the present case comes well within the statutory definition. It is not merely peripheral to it or completely outside of it as was the case in *National Labor Relations Board* v. *International Longshoremen's Association*, 332 F. 2d 992 (4th Cir. 1964) in which the cause of work stoppage was purely political, i.e. refusal to load cargo on a vessel because it was destined for delivery to Cuba.

The Petitioner also asserts that there can be no violation of §8(b)(4) unless there exists a dispute with a primary employer. In effect it argues that §8(b)(4) was enacted to prohibit the use of a secondary boycott and that a secondary boycott cannot exist unless there is a dispute between the union and a primary employer. The statute does not use either the term "secondary boycott" or the term "primary employer." It is true that these words frequently appear in the legislative history for the reason that they assist in describing the most usual form of the kind of activity Congress intended to proscribe but Congress did not use those terms in the statute nor did the Senators and Representatives show by using them in debates and reports that the operation of the statute was to be coextensive with the usual meaning of those terms. Indeed, the Supreme Court has said that all secondary

boycotts were not outlawed in §8(b)(4)(A), which is the present §8(b)(4)(B).

> " 'The section does not speak generally of secondary boycotts. It describes and condemns specific union conduct directed to specific objectives. . . . Employees must be induced; they must be induced to engage in a strike or concerted refusal; an object must be to force or require their employer or another person to cease doing business with a third person. . . .' "

*Local 761, Int'l Union of Elec. Workers* v. *National Labor Relations Board,* 366 U. S. 667, 672-673 (1961). Likewise it may be said that the statute proscribes certain union conduct, directed to a specific objective, which does not fall squarely within a strict definition of secondary boycott but which is sufficiently analogous to it to be encompassed within "the broad and somewhat vague concept of secondary boycott" as the term was used in congressional debate and plainly within the kind of conduct Congress intended to prohibit.

In *Local 761, Int'l Union of Elec. Workers* v. *National Labor Relations Board, supra,* Mr. Justice Frankfurter also said, at p. 672, with respect to §8(b)(4)(A) [now (B)] that it could not be literally construed; otherwise it would ban most strikes historically considered to be lawful.

In interpreting the subsection the courts have reduced it in its effect to something less than its broad literal wording, not to conform to legislative predilections of their own, but on the necessary assumption that Congress intended to proscribe peaceful picketing only where such prohibition was necessary to stop union conduct which experience had shown to be damaging and undesirable and where there was, therefore, a reasonable basis for preventing conduct which otherwise could not be forbidden because of the First Amendment. As a natural consequence of this assumption, the courts have required that the acts sought to be prohibited plainly appear from the legislative history to be

included within the kind or type of harmful conduct Congress meant to prevent. *National Labor Relations Board* v. *Fruit and Vegetable Packers & Warehousemen, Local 760,* 377 U. S. 58, 63 (1964).

In the process of interpretation the courts have also been mindful of the effort by Congress, in passing the Labor Management Relations Act, to balance the need, on the one hand, to preserve the "normal flow of commerce," and the need, on the other hand, to preserve the right to strike as an essential of free collective bargaining.

> "The character of the problem of reconciliation of the right to strike with the limitations expressed in §8 (b)(4) is not unlike that which confronted the Court in *Allen Bradley Co.* v. *Local Union No. 3,* 325 U. S. 797, 806:
>
> 'The result of all this is that we have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.' " *National Labor Relations Board* v. *International Rice Milling Co.,* 341 U. S. 665 (1951) at 673, n. 7.

In considering and applying these principles we are of the opinion that Congress did not intend to confine the effect of §8(b)(4) to a strict or precise definition of the term "secondary boycott" nor did it intend to require the existence of a "primary employer" as a prerequisite to the applicability of the subsection.

Attention must instead be turned to a consideration of the evils Congress sought to eliminate in enacting §8(b)(4). In *National Labor Relations Board* v. *Denver Building & Construction Trades Council,* 341 U. S. 675, 692 (1951),

the Court declared that Congress' purpose was to shield "unoffending employers and others from pressures in controversies not their own." See also *Miami Newspaper Pressmen's Local No. 46* v. *National Labor Relations Board,* 322 F. 2d 405 (D. C. Cir. 1963). Whether the striking union is at war with a primary employer and puts damaging economic pressure on a neutral employer with the design of increasing the economic pressure on the primary employer through such secondary activity or is, instead, at war with another union and, in adopting secondary activity, is using damaging economic pressure on a neutral employer to achieve its objective of prevailing over the rival union, makes no logical difference in the light of the clear purpose and intention of Congress to confine the warfare to an area which includes direct action against the principal antagonist whether it be a primary employer or a rival union and which would exclude the use of economic pressure by a union against neutral employers as an indirect means of exerting force against the union's principal target. Of course, exceptions have been recognized in so-called "situs" cases where damage to the secondary employer is only an incidental by-product of the action taken directly against the primary target and it is not an object of the union to use pressure on the secondary employer for that purpose. *New Power Wire and Electric Corp.* v. *National Labor Relations Board,* 340 F. 2d 71 (2d Cir. 1965); *National Labor Relations Board* v. *Local 294, Int'l Brotherhood of Teamsters,* 284 F. 2d 887 (2d Cir. 1960); *Seafarers Int'l Union* v. *National Labor Relations Board,* 265 F. 2d 585 (D. C. Cir. 1959); *Sailors' Union of the Pacific (Moore Drydock Co.),* 92 N. L. R. B. 547 (1950). See also §8(b)(4)(e) of the Act. Exceptions also appear in the proviso of §8(b)(4) and §8(b)(7)(c) concerning informational picketing. But these do not include cases such as that now before us.

Secondary economic pressure generated in a controversy over representation or jurisdiction has no less an impact on

neutral employers than where secondary activity is resorted to in furtherance of a dispute with a primary employer. Congress' concern for neutral employers in these situations is no less great. It is absurd to suppose that Congress intended to afford the protection to unoffending neutral employers from a contest between an offending employer and its union employees but that it did not intend to afford protection to neutral unoffending employers when the employer itself was also unoffending. It certainly makes little difference to the neutral employer whether the damage he suffers is the result of a blow being delivered by the union against a primary employer or against another union. But even though Congress was doubtless motivated by a feeling that it was inherently unfair to permit unlimited injury to an innocent bystander, the most compelling reason for prohibiting such secondary activities was that the damage and disruption to the normal flow of commerce, which was an inevitable consequence, far outweighed the need of the unions for such a weapon in effective collective bargaining. See Labor Management Relations Act, 1947, I Leg. Hist. 481 and II Leg. Hist. 1047, 1108, 1368.

The petitioner relies strongly upon *Douds* v. *International Longshoremen's Association, Independent,* 224 F. 2d 455 (2d Cir.), cert. denied 350 U. S. 873 (1955). In that case a divided panel of this court held that a secondary strike to advance a union's position in a contest for representation with another union did not constitute a violation of §8 (b)(4). The members of the International Longshoremen's Association, Independent who were employees of the New York Shipping Association, which operated steamships, stevedoring companies, etc., refused to serve, at New York piers, trucks driven by A. F. of L. drivers because the trucks had refused to cross a picket line set up at the piers by a rival longshoremen's union which was A. F. of L. affiliated. This caused an almost complete cessation of business at the piers. The majority of the court held (L. Hand, *J.*), that, inasmuch as the ultimate objective

of the independent union was to win out in a struggle with the A. F. of L. affiliated union for control of the port, it did not matter that the means used to achieve that end or any intermediate objectives that may have been entertained violated §8(b)(4) because the final objective was legitimate. It also found that the facts did not fit the usual meaning of "secondary boycott" at the same time noting that §8 (b)(4) goes further than prohibiting secondary boycotts in the usual meaning of that term. All of the activity under consideration in the case took place at certain piers in New York City where the employer carried on its business and where incoming and outgoing cargoes were dealt with by longshoremen who received them from or delivered them to truckers, to be taken aboard the ships or delivered to consignees, as the case might be. While the court did not expressly treat this as a "situs" case, the particular circumstances generated the innumerable complexities which characterize those cases. Everything took place at the premises where the employer's business was located. Neither of the struggling union contestants had the right to represent the employees. An election had been held but the result was under review and had not been determined. That some union should have the right to represent the employees was vital to the very existence of free collective bargaining and the contest between the unions was closely bound to the rights of the employees to have someone bargain for them. Difficulties, later cured by the 1959 amendment to §8(b)(4) and by §8(b)(7), added to the complexities of the case. It is evident that this court endeavored to cut the Gordian knot by adopting the premise that, if the ultimate objective of the union was legitimate, §8(b)(4) was not at all concerned with how, on the facts there presented, the union achieved it. The circumstances of the present case are obviously quite different in that the activity indulged in here encompassed widely scattered employers and employees who had no direct connection with the inter-union contest going on at Pier 84, South, in Philadelphia.

Moreover, both MEBA and NMU had outstanding contracts which, between them, covered all maritime employees directly concerned, so that no group was struggling to achieve representation, for collective bargaining purposes, in a situation where it had none. We do not feel that the principles enunciated in *Douds* v. *International Longshoremen's Association, Independent, supra,* should be employed in deciding the present case. To apply to this case the concept that §8(b)(4) interdictions are not to be considered if the final object of the union is lawful, would place the decision of this case at odds with the statute which requires only that *an* object (not the ultimate object) of the strike or refusal to transport, handle, etc., is forcing any person to cease doing business with any other person. It would be at odds with the Supreme Court's statement in *National Labor Relations Board* v. *Denver Building & Construction Trades Council, supra,* at 689, that:

> "It is not necessary to find that the *sole* object of the strike was that of forcing the contractor to terminate the subcontractor's contract. This is emphasized in the legislative history of the section."

See also *Local 1976, United Brotherhood of Carpenters and Joiners of America* v. *National Labor Relations Board,* 357 U. S. 93, 98 (1958). It has had no persuasive following in other circuits which have passed upon cases under §8(b)(4) in which the lawful ultimate object theory could have been followed. *National Labor Relations Board* v. *Local 101, International Union of Operating Engineers, AFL-CIO,* 315 F. 2d 328, 330 (10th Cir. 1963); *Local No. 636, United Association of Journeymen and Apprentices of Plumbing and Pipe Fitting Industry of United States and Canada, AFL-CIO* v. *National Labor Relations Board,* 278 F. 2d 858 (D. C. Cir. 1960); *Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, Local 88* v. *National Labor Relations Board,* 237 F. 2d 20 (D. C. Cir. 1956); *National Labor Relations Board* v. *Local 11,*

*United Brotherhood of Carpenters & Joiners of America, AFL*, 242 F. 2d 932 (6th Cir. 1957). Cf. *National Labor Relations Board* v. *United Brotherhood of Carpenters and Joiners of America, AFL-CIO*, 261 F. 2d 166 (7th Cir. 1958).

This court has not applied such a doctrine in any related case since *Douds* was decided nor has it been discussed nor has reference been made to it. *National Labor Relations Board* v. *Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 273 F. 2d 696 (2d Cir. 1960); *National Labor Relations Board* v. *Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 284 F. 2d 887 (1960); *National Labor Relations Board* v. *Milk Drivers and Dairy Employees Local Union No. 584, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*,——F. 2d——(2d Cir. Jan. 26, 1965).

The respondent Labor Board found the facts recited above; the findings are fully supported by the evidence. The Board concluded that NMU's picketing at Philadelphia, Houston and Galveston induced and encouraged individuals employed by steamship agents, stevedoring companies and marine warehouse operators in those parts to strike and to refuse in the course of their employment to perform services for their employers within the meaning of §8 (b)(4)(i) and that the picketing constituted coercion and restraint of those employers within the meaning of that section, and that the object of this conduct was to bring about a cessation of business at the particular piers between the employers mentioned and the owners and operators of the vessels and anyone else doing business with any of them at the piers. We find no error in these conclusions; they are amply supported by the record as a whole. The petitioner takes particular exception to the use by the Hearing Examiner of the term "foreseeable consequences," in connection with the work stoppage following the establishment of one or more of the picket lines,

as an element in the proof that this was "signal" picketing. Such a phrase, with its tort implications, is not descriptive of a proper basis for concluding that picketing is signal picketing because a work stoppage might be highly probable in response to what was genuinely intended to be nothing more than informational picketing and the union might immediately after such stoppage make it clear to all concerned that no such result was intended. Under such circumstances there would be no violation of §8(b)(4) even though a reasonably prudent man would have foreseen that such cessation of business would occur. In this case both from what the union said and did and from what it failed to say and do to make clear that no work stoppage was sought, there was ample evidence, separate and distinct from any consideration of foreseeability, to show that cessation of business was what the union intended to achieve all along and that its activity was in fact "signal picketing." The use of the phrase was harmless under these circumstances.

Having determined that the Board was correct in concluding that an object of petitioner's picketing was to induce work stoppages among employees of secondary employers to force such employers, through economic pressure, to support petitioner's retaliation against MEBA, in violation of §8(b)(4), we find that there is no substance to the petitioner's claim that its rights under the First Amendment to the Federal Constitution have been impaired. *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U. S. 694, 705 (1951).

The petitions to review are dismissed and enforcement is granted on both of the cross-petitions.

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# In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 334

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. 24–37) is reported at 342 F. 2d 538. The Board's Decisions and Orders (1 J.A. 1–26, 2 J.A. 1–31) [1] are reported at 147 NLRB 1317 and 147 NLRB 1243.

[1] Two cases, one involving the Union's picketing in the Port of Philadelphia and the other involving its picketing at Houston and Galveston, were consolidated in the court of appeals and docketed as Numbers 29067 and 29068, respectively. "1 J.A." refers to the Joint Appendix in No. 29067. "2 J.A." refers to the Joint Appendix in No. 29068.

## JURISDICTION

The decrees of the court of appeals were entered on April 9, 1965 (Pet. 38–41). The Union's petition for rehearing was denied on April 12, 1965. The petition for a writ of certiorari was filed on July 9, 1965. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Board has jurisdiction to prevent an unfair labor practice arising out of an inter-union controversy concerning representation.

2. Whether the protection afforded neutral employers by Section 8(b)(4)(B) of the Act covers a situation where the union's ultimate dispute is with another union, rather than with another employer.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at pages 21–23 of the petition and p. 8, n. 5, *infra*.

## STATEMENT

A. *The Board's findings of fact.* The present cases arise out of a dispute concerning representation of employees on the *S.S. Maximus* between the Marine Engineers Beneficial Association (MEBA) and the Seafarers International Union (SIU) on the one hand, and the National Maritime Union (NMU), petitioner here, and its affiliate, the Brotherhood of Marine Officers (BMO), on the other. In June 1963, the *Maximus,* which the Grace Line recently had sold to Cambridge Carriers, arrived in the Port of Phila-

delphia to take on cargo. When Grace owned the *Maximus,* it had been manned by members of MEBA. After the vessel was sold to Cambridge Carriers, the MEBA engineers were replaced by members of BMO. On June 10, 1963, MEBA began to picket the *Maximus* with signs characterizing Cambridge Carriers as unfair to MEBA engineers. In retaliation, NMU established picket lines at various piers in the ports of Philadelphia, Houston and Galveston, where ships with MEBA members in their crews had docked. Similar "response" picketing of MEBA-manned ships occurred in the Port of New Orleans.[2]

In Philadelphia, NMU picketing began on June 14, 1963, at the pier where the Weyerhaeuser ship *George S. Long,* manned by MEBA engineers, was moored. On June 19, the picketing was extended to cover the *Portmar,* owned by Calmar Steamship Corporation and also manned by MEBA engineers (1 J.A. 11–12, 37–38, 40, 43–44, 45, 53, 58, 64, 74–75, 105–106). The picketing continued through June 20 (1 J.A. 12, 39, 42, 74, 76, 91–92). The pickets carried signs which read, "Information Picketing MEBA Engineers Interfere with Employers Who Lawfully Recognize N.M.U." (see 1 J.A. 11, 57). The pickets and other NMU agents distributed leaflets addressed "To all union men." The leaflet stated that MEBA was

[2] The New Orleans picketing was found unlawful by the Board in a decision reported at 147 NLRB 1328 (1 J.A. 132–158). On April 15, 1965, the Court of Appeals for the District of Columbia Circuit enforced the Board's order in that case. The court's decision is printed at pp. 42–59 of the petition, and discussed at pp. 10–11, *infra.*

picketing the *Maximus* because "it wants the jobs of the NMU and BMO members." Another portion of the leaflet stated: "We want the shipowners and the stevedoring companies to know that if they can't stand up to outfits that try to put pressure on them in a phony beef, then they're really going to be in trouble" (1 J.A. 11–12, 44, 45, 127).

From June 14 to June 19, Nacirema Operating Co., a corporation performing stevedoring services in Philadelphia for Calmar and Weyerhaeuser, ordered gangs of longshoremen to unload the *George S. Long*, but the men refused to cross the picket line (1 J.A. 12, 94–95, 100, 113–114). Similarly, on June 19 and 20, the day and night gangs ordered by Calmar's port agent to work on the *Portmar* refused to cross NMU's picket line (1 J.A. 12, 70–71). On June 18, 19 and 20, Hinkins Steamship Company, Weyerhaeuser's agent for soliciting and receiving cargo, requested that the picket line be moved, but picket Captain Jardine and NMU Port Agent Parise rejected the requests (1 J.A. 14–15, 99–101, 101–102, 104, 106–107). Similarly, on June 19 and 20, Calmar's agent made numerous requests of Jardine and Parise to move the pickets so that clerks and checkers, members of International Longshoremen's Association (ILA), could go to work, but these requests were also rejected, and none of the clerks and checkers crossed the line (1 J.A. 15–16, 65–66, 68–69, 73, 76–77, 78, 86).

On June 17, 1963, NMU began to picket in Houston and Galveston (2 J.A. 2, 15). The pickets carried signs identical with those used in Philadelphia (2

J.A. 16, 62, 71, 113, 115, 117) and distributed leaflets which were substantially the same as those used in Philadelphia (2 J.A. 5, 16, 48, 56–57, 119).

At the Navigation District wharves in Houston,[3] picketing took place on June 18, 19, and 20 at the entrance gates normally used by stevedoring company and Navigation District personnel who are members of the ILA, and by truckers making deliveries (2 J.A. 15, 45, 53). During the picketing, employees from ILA locals were ordered to work on the eight ships berthed at Navigation District piers, but the men refused to cross the picket line and all the ships were idled (2 J.A. 2, 15, 46–50, 54–55). Picketing occurred at the main gate of the Long Reach docks in Houston from June 17 through June 20. There were eight ships at the docks at this time, and no work of any kind was done by any employees during the period of the picketing (2 J.A. 15–16, 61–66).

At Galveston, the picketing followed a pattern similar to that at Houston. Delta Steamship Lines' vessel, *Del Alba,* arrived at Pier 35 on June 16 with a cargo of raw sugar (2 J.A. 16–17, 70), and NMU picketed that pier on June 17 and 18. No longshoremen crossed the line and the vessel was not unloaded (2 J.A. 16–17, 70–74).

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[3] In Houston, most of the wharves, warehouses and other marine terminal facilities are operated by Harris County-Houston Ship Channel Navigation District ("Navigation District") (2 J.A. 12, 14, 41). Gulf Atlantic Warehouse Company also operates a marine terminal in Houston known as the "Long Reach" docks (2 J.A. 12, 58–59).

NMU did not have a dispute with any employer at any of the docks it picketed in Philadelphia, Houston or Galveston (1 J.A. 2; 2 J.A. 5, 58, 63, 66, 67, 70, 74, 77). It did not use the newspaper or radio to publicize its dispute with MEBA (2 J.A. 92, 102) and did not picket MEBA headquarters in Galveston or Houston (2 J.A. 91, 95, 102). NMU officials did not inform the ILA rank-and-file or any ILA official that it would be all right for ILA members to cross the picket lines (2 J.A. 95, 102, 107). NMU's Houston port agent, McDowell, was aware that the picketing was causing work stoppages at the port and so informed NMU headquarters in New York. He received no instructions to alter the method of picketing so as to alleviate the work stoppages (2 J.A. 106).

On June 20, Port Agent McDowell learned that the Secretary of Labor had arranged a settlement of the dispute in Philadelphia concerning the *Maximus*. McDowell announced to newspaper reporters, "I have just called off my pickets, and as far as I am concerned the port can get back into operation" (2 J.A. 6, 17, 105, 109–111).

B. *The Board's conclusions and order.* Upon the foregoing facts, the Board concluded that NMU had violated Section 8(b)(4)(B) of the Act. The Board found that NMU had induced and encouraged employees of Weyerhaeuser, Calmar, Nacirema and Hinkins to strike and had restrained and coerced those neutral employers, with an object of forcing them to cease doing business with each other or with any other person at Pier 27 in the Port of Philadelphia (1 J.A.

1–2, 22–24). The Board further found that NMU had induced and encouraged employees of various employers, including the Navigation District, Gulf Atlantic Warehouse Company, Delta Steamship Lines and employer-members of Houston Maritime Association, to strike and had restrained and coerced those neutral employers, with an object of forcing them to cease doing business with each other and with other employers and persons engaged in commerce (2 J.A. 6, 25–26). The Board ordered NMU to cease and desist from the unfair labor practices found, and to post appropriate notices (1 J.A. 3–5, 24–25; 2 J.A. 6–9, 26–28).

C. *The court of appeals' decision.* The court of appeals sustained the Board's findings and enforced its orders (Pet. 24–37).

## ARGUMENT

The decision of the court of appeals is correct and is not in conflict with the decision of any other circuit. There is thus no occasion for further review.

Section 8(b)(4)(i)(ii)(B) of the Act makes it an unfair labor practice for a labor organization "to induce or encourage any individual employed by any person * * * to engage in, a strike or a refusal in the course of his employment * * * to perform any services," or "to threaten, coerce, or restrain any person," where "an object" is "forcing or requiring any person * * * to cease doing business with any other person * * *." On the findings of the Board, approved by the court below (see Statement, *supra*, pp. 6–7), it is clear that NMU's picketing violated the

literal terms of this provision.[4] Nevertheless, petitioner contends (1) that the Board was without jurisdiction because the underlying controversy did not constitute a "labor dispute" within the meaning of Section 2(9) of the Act, and (2) that there could be no "secondary boycott" since the real dispute was with another union and not with a "primary employer." The court below properly rejected both contentions.

1. Section 2(9) of the Act defines the term "labor dispute" "*[w]hen used in this Act*" (emphasis added). But that term is not used in Section 8(b)(4)(B) or in the broad jurisdictional provision of Section 10(a).[5] Thus the Board's jurisdiction over unfair labor practices is nowhere made expressly dependent upon the existence of a "labor dispute" as defined in Section 2(9). But even assuming such a requirement were implicit in the Act, the court below correctly concluded that a "labor dispute" was involved in the present case. Section 2(9) (Pet. 21) defines "labor dispute" to include "any controversy * * * concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seek-

[4] Petitioner's statement (Pet. 4, n. 2) that both the Board and court below conceded that NMU's objective in picketing was legal and proper is incorrect. As the court below observed (Pet. 27), the Board found only that NMU's *ultimate* object—protecting itself in a representation dispute with a rival union—was lawful; it found, however, that the immediate object of the picketing was to exert economic pressure on neutral employers by causing a cessation of business—"an object" which is proscribed by Section 8(b)(4)(B) of the Act.

[5] Section 10(a) provides that:

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

ing to arrange terms or conditions of employment." The ultimate object of NMU's picketing was to preserve its right to represent the employees on the *Maximus* and to administer the collective bargaining agreement which it had obtained covering those employees against the rival claim asserted by MEBA. As NMU explained the dispute to its own members, its action was taken to defend the principle—with which MEBA allegedly was not in accord—that "if [a ship] is sold to an unorganized company, it becomes a legitimate organizing objective for any union" (1 J.A. 129). This Court has consistently held that such a conflict between unions over matters of representation or jurisdiction constitutes a "labor dispute" within the definition in Section 2(9).[6] The cases cited (n. 6, *supra*) may not be fairly distinguished on the ground that they involved the Norris-LaGuardia Act (Pet. 11–12).[7] Section 13(c) of that Act contains virtually the same definition of "labor dispute" as Section 2(9) of the NLRA. Section 13(a) of the Norris-LaGuardia Act, which makes specific reference to inter-union disputes, merely illustrates the kind of cases which "shall be held to involve or to grow out

[6] See, *e.g.*, *Milk Wagon Drivers' Union* v. *Lake Valley Farms Products, Inc.*, 311 U.S. 91, 99–100; *United States* v. *Hutcheson*, 312 U.S. 219; *Fur Workers' Union, Local No. 72* v. *Fur Workers Union, No. 21238*, 105 F. 2d 1 (C.A.D.C.), affirmed, 308 U.S. 522. See also *Green* v. *Obergfell*, 121 F. 2d 46 (C.A.D.C.); *Teamsters* v. *Brewery Workers*, 106 F. 2d 871 (C.A. 9).

[7] It is quite natural that precedents on this issue would be found in Norris-LaGuardia Act cases since the operative provisions of that Act, unlike Section 10(a) of the NLRA (n. 5, *supra*), depend upon the existence of a "labor dispute." See Sections 1, 4–10, 29 U.S.C. 101, 104–110.

of a labor dispute"; it does not alter the general definition of "labor dispute" contained in Section 13(c) (Pet. 28–29).

Contrary to petitioner's contention (Pet. 8–10), the decision below does not conflict with *National Labor Relations Board* v. *International Longshoremen's Ass'n* (*Tulse Hill*), 332 F. 2d 992 (C.A. 4). In that case the Board found that the union's boycott of ships which had been used in trade with Cuba was an unfair labor practice and ordered it to cease and desist. The court of appeals denied enforcement of the Board's order for two reasons. First, the Fourth Circuit found that, since ILA's conduct in implementing a policy calculated to eliminate trade with Cuba was not based on a controversy grounded in "terms and conditions of employment," there was no "labor dispute" but only a political question which the Act did not reach (*id.* at 995–996). Second, it found that, in any event, ILA's action did not amount to restraint or coercion of neutral employers for any object proscribed by Section 8(b)(4)(B) (*id.* at 996–999). In contrast, the court below found no occasion to consider what would follow if there were no "labor dispute" since it concluded (Pet. 29) that the present case presents an ordinary conflict over representation and jurisdiction between competing unions which "comes well within the statutory definition" of that term. Moreover, the court found that NMU conducted its picketing by the means, and for an objective, proscribed by Section 8(b)(4)(B).

Nor does the decision below conflict with that of the District of Columbia Circuit in the related case

involving NMU's picketing in New Orleans (n. 2, *supra;* Pet. 12–13). Like the court below, the District of Columbia Circuit was not required to reach the question whether the Board would have had jurisdiction in the absence of a labor dispute, and it expressly pretermitted that issue (Pet. 50). Also like the court below, that court found that, unlike in *Tulse Hill,* the union's activity satisfied the means and object requirements of Section 8(b)(4)(B) (Pet. 49–50, 52, 56).

2. Petitioner's second argument is likewise without merit. There is no justification for restricting Section 8(b)(4)(B) to the situation where the union's underlying dispute is with a primary employer rather than with another union. In enacting that Section, Congress' purpose was to shield "unoffending employers and others from pressures in controversies not their own." *National Labor Relations Board* v. *Denver Building & Construction Trades Council,* 341 U.S. 675, 692. As the court below noted (Pet. 32–33), "[s]econdary economic pressure generated in a controversy over representation or jurisdiction has no less an impact on neutral employers than where secondary activity is resorted to in furtherance of a dispute with a primary employer." Moreover, contrary to petitioner (Pet. 14–16), the legislative history confirms that Congress intended to prohibit secondary pressure, not only when used in furtherance of a dispute with a primary employer, but also when used in furtherance of inter-union jurisdiction or representation disputes. See the history cited in the

decision of the District of Columbia Circuit in the case involving NMU's picketing in New Orleans (Pet. 50–51, n. 8; 54–55, n. 12).[8]

Petitioner is not aided by its reliance (Pet. 16–19) on *Douds* v. *International Longshoremen's Ass'n*, 224 F. 2d 455 (C.A. 2), certiorari denied, 350 U.S. 873,[9] in which the Second Circuit held that Section 8(b)(4) proscribed secondary activity only if the union's ultimate object, and not merely its intermediate object, was to force a cessation of business relations (*id.* at 459–460). Even if applicable to the facts of this case, that decision is no longer an authoritative precedent. As the Second Circuit pointed out in declining to follow *Douds* here (Pet. 35–36), the "lawful ultimate object theory" of that case is at odds with the language of the statute, the holding of this Court in *National Labor Relations Board* v. *Denver Building & Construction*

[8] There is no substance to petitioner's contention (Pet. 19–20) that the fact that Congress dealt with the subject of inter-union disputes in Sections 8(b)(4)(D) and 10(k) of the Act shows that Section 8(b)(4)(B) was not intended to reach such disputes. Section 8(b)(4)(D) interdicts both primary and secondary pressure to force an employer to assign work to one group of employees rather than to another group of employees. Section 8(b)(4)(B), on the other hand, interdicts only secondary pressure for a different object, *i.e.*, to force a cessation of business relations. See *Local No. 5, United Association of Journeymen, etc.* v. *National Labor Relations Board*, 321 F. 2d 366, 371 (C.A.D.C.), certiorari denied, 375 U.S. 921.

[9] In *Douds*, the court reversed a contempt citation against an independent longshoremen's union which had refused to handle goods carried by AFL truckers. The truckers had honored the picket line of a rival longshoremen's union which was contesting with the independent union for the right to represent the employees of the company to which the truckers were making deliveries.

*Trades Council*, 341 U.S. 675, 689, and the consistent trend of subsequent court of appeals decisions in other circuits as well as in the Second Circuit.[10] The decision of the District of Columbia Circuit in the related case involving NMU's picketing in New Orleans is in accord with that of the court below on this point (Pet. 56–57).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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August 1965.

[10] The court below also pointed out (Pet. 34–35) that the situation in *Douds* was a special one, and that many of the difficulties which the court sought to avoid by its decision in that case were cured by the 1959 amendments to Section 8 (b) (4) and by the enactment of Section 8(b) (7).

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# In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 403

NATIONAL MARITIME UNION OF AMERICA, AFL–CIO,
PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. 18–35) is reported at 346 F. 2d 411. The Board's Decision and Order (J.A. 1–27) [1] are reported at 147 NLRB 1328.

### JURISDICTION

The decree of the court of appeals was entered on May 5, 1965 (Pet. 36). The union's petition for rehearing was denied on May 14, 1965. The petition

[1] "J.A." refers to the Joint Appendix filed in the court of appeals.



785-520—65

for a writ of certiorari was filed on July 28, 1965. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Board has jurisdiction to prevent an unfair labor practice arising out of an inter-union controversy concerning representation.

2. Whether the protection afforded neutral employers by Section 8(b)(4)(B) of the Act covers a situation where the union's ultimate dispute is with another union rather than with another employer.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are set forth at pages 16–17 of the petition.[2]

## STATEMENT

A. *The Board's findings of fact.* The present case arises out of a dispute concerning representation of employees on the *S.S. Maximus* between the Marine Engineers Beneficial Association (MEBA) and the Seafarers International Union (SIU)[3] on the one

[2] Section 10(a), also relevant, provides that:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *"

[3] Petitioner contends (Pet. 5) that, by originally referring to SIU as the union which petitioner was opposing and later amending its opinion to substitute "MEBA" where it had used "SIU" before, the court below evinced a basic misunderstanding of the issues. This contention is without substance. NMU's official organ, reporting on the incidents involved here, carried the boldface heading: "NMU Answers SIU Disruption On Waterfront." The report itself contained numerous references

hand, and the National Maritime Union (NMU), petitioner here, and its affiliate, the Brotherhood of Marine Officers (BMO), on the other. In June 1963, the *Maximus,* which the Grace Line recently had sold to Cambridge Carriers, arrived in the Port of Philadelphia to take on cargo. When Grace owned the *Maximus,* it had been manned by members of MEBA. After the vessel was sold to Cambridge Carriers, the MEBA engineers were replaced by members of BMO. On June 10, 1963, MEBA began to picket the *Maximus* with signs characterizing Cambridge Carriers as unfair to MEBA engineers. In retaliation, NMU established picket lines at various places in the Port of New Orleans, where ships with MEBA members in their crews had docked. Similar "response" picketing of MEBA-manned ships occurred in Philadelphia, Houston and Galveston.[4]

On June 17, 1963, NMU began picketing Delta Steamship Lines' Poydras Street wharf, where the *S.S. Del Valle* was in port, and Bloomfield Steamship Company's Cotton Warehouse wharf, where the *Neva West* was docked (J.A. 2, 40–41, 68). The

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to SIU and "SIU–MEBA", indicating those allied unions were the targets of NMU's actions. See the Joint Appendix filed with this Court in the case arising out of NMU's picketing at the Port of Philadelphia, No. 334, this Term, p. 129. See also n. 5, *infra*, and accompanying text.

[4] This picketing was found unlawful by the Board in decisions reported at 147 NLRB 1317 (Philadelphia), and 147 NLRB 1243 (Houston and Galveston). On March 5, 1965, the Court of Appeals for the Second Circuit enforced the Board's orders in these cases, 342 F. 2d 538 (Pet. 37–50). The union's petition for certiorari to review the Second Circuit's decision was filed July 9, 1965, and the Board has filed a brief in opposition (No. 334, this Term).

pickets carried signs which read: "Informational Picketing MEBA Engineers Interfere With Lawfully Recognized N.M.U." (J.A. 28, 41). Both Delta and Bloomfield had bargaining agreements with MEBA and SIU; neither had an agreement with NMU or BMO (J.A. 2, 41, 46–47, 64). NMU did not have a dispute with either company (J.A. 2, 47, 52, 64–66).

On June 17 and 18, the longshoremen ordered by Delta to unload the *Del Valle* refused to cross NMU's picket line (J.A. 3, 39–40, 42–43). When the ship was moved from the wharf to a general anchorage point, the picketing ceased (J.A. 43–44). Later on June 18, Delta's *S.S. Del Mar* arrived at the Poydras Street wharf, and, there being no pickets, the longshoremen ordered by Delta to unload passengers and cargo did so (J.A. 44). On June 19, NMU resumed picketing, and the longshoremen again refused to cross the picket line to complete unloading the *Del Mar* or to unload the *Del Valle,* which had been brought back to the wharf (J.A. 3, 44–45, 48–49). Neither ship was unloaded until the afternoon of June 20 when, because the dispute involving the *Maximus* in Philadelphia had been settled, the picketing in New Orleans ceased.

In the meantime, Delta had awarded contracts for repairs needed on the *Del Valle* to Buck Kriehs and Company and Best Electric Company. Kriehs' general manager informed Delta that he could supply no men as long as there was a picket line. Best's shop superintendent came to the ship to pick up a part for repair, but he refused to cross NMU's picket line and did not receive the part (J.A. 53–54). Delta's own car-

penters and painters, after consultation with their union business agents, refused to cross NMU's picket line to work on the *Del Valle* (J.A. 55).

The picketing of the *Neva West,* from June 17 through June 20, produced similar results. During this time Bloomfield's port agent, States Marine Agency, ordered, through T. Smith and Company, a gang of longshoremen to work on the vessel. The men would not cross NMU's picket line, and no work was done on the ship (J.A. 3, 67–68, 69–71, 73–75, 76).

Forklift operators employed by States Marine encountered NMU pickets at the intersection of two streets leading to the Cotton Warehouse docks on the morning of June 17. The operators, members of the International Longshoremen's Association, did not cross the picket line but telephoned the ILA delegate who later arrived on the scene and told the NMU pickets they were "picketing the wrong place" (J.A. 80–82). After making a phone call, one of the pickets stated to the ILA delegate, "We are not picketing the docks. We are picketing the ship to keep the longshoremen from going on" (J.A. 4, 82). Thereafter, the pickets moved to the vicinity of the *Neva West* and the forklift operators reported for work on the docks (J.A. 71–72).

After Dixie Machine, Metal and Welding Works, Inc., a marine repair company, had received an order to repair a line on the *Neva West,* its pipefitter foreman went to the vessel and asked NMU's picket whether he could go aboard to make the repair. The picket refused to grant him permission to board (J.A.

4, 78–79). After the picketing had ceased, the pipefitter returned and made the repair (J.A. 79).

Faced with the refusal of longshoremen and others to cross the picket line, Bloomfield's vice-president, Weickhoff, telephoned NMU's port agent, George, on June 18 and asked him to call off the pickets. George refused to order a halt to the picketing although he stated he had full authority to do so (J.A. 4–5, 60–61). Weickhoff renewed his request on June 19, but George responded that "we want you to be good and mad and make a lot of noise. * * * I want you to call Paul Hall[5] and tell him to call off the MEBA pickets on the *Maximus*" (J.A. 4–5, 63).

B. *The Board's conclusions and order.* Upon the foregoing facts, the Board concluded that NMU had violated Section 8(b)(4)(B) of the Act. The Board found that NMU had induced and encouraged employees of Delta, Bloomfield, States Marine, T. Smith and Company, Best Electric, and Dixie Machine to strike, and had restrained and coerced those neutral employers and Buck Kriehs and Company, with an object of forcing them to cease doing business with each other and with other persons (J.A. 6–7). The Board ordered NMU to cease and desist from the unfair labor practices found, and to post appropriate notices (J.A. 8–10).

C. *The court of appeals' decision.* The court of appeals sustained the Board's findings and enforced its order (Pet. 18–36).

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[5] International President of SIU.

## ARGUMENT

The present case and *National Maritime Union* v. *National Labor Relations Board* (No. 334, this Term) raise identical issues, a detailed discussion of which is contained in our brief in opposition to the petition for certiorari filed in the latter case. Briefly stated, the government's position is that the decision below is correct and is not in conflict with that of any other circuit. The court below, like the Second Circuit in the companion case (No. 334), found no occasion to reach the question, discussed in *National Labor Relations Board* v. *International Longshoremen's Ass'n* (*Tulse Hill*), 332 F. 2d 992 (C.A. 4) (picketing for political reasons), whether a "labor dispute" as defined in Section 2(9) of the Act is a prerequisite to the Board's jurisdiction over unfair labor practices. Even if such a dispute is required, it is present in this case. Moreover, the protection offered to neutral employers by Section 8(b)(4)(B) is not limited to situations in which the union's dispute is with a primary employer rather than with another union. The court below agreed with the Second Circuit's decision in the companion case that *Douds* v. *International Longshoremen's Ass'n*, 224 F. 2d 455 (C.A. 2), certiorari denied, 350 U.S. 873, is not an authoritative precedent for the contrary view.

## CONCLUSION

For the reasons more fully set forth in our brief in opposition to the petition for certiorari filed in No. 334, this Term, we respectfully submit that the petition for a writ of certiorari in the present case should also be denied.

RALPH S. SPRITZER,
*Acting Solicitor General.*

ARNOLD ORDMAN,
*General Counsel,*
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965.

No. 334.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

*Petitioner,*

*against*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

## REPLY TO BRIEF IN OPPOSITION.

ABRAHAM E. FREEDMAN,
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346 Pandick Press, Inc., 22 Thames St., New York, N. Y. 10006, U. S. A.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

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**No. 334.**

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NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Petitioner

*against*

NATIONAL LABOR RELATIONS BOARD,

Respondent

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## REPLY TO BRIEF IN OPPOSITION.

In the Brief in Opposition, counsel for the Board has continued to perpetuate the misconception that the NMU picketing somehow related to a dispute over jurisdiction or representation. It is apparent that counsel is resorting to this fallacious argument in a desperate effort to cure the defect in the Board's jurisdiction arising from the lack of a "labor dispute" as defined in the Act. However, despite the constant repetition of this argument, the record makes it abundantly clear that it is contrary to the facts, without any evidential basis and is not supported by any findings by the Board.

It is clear that the Marine Engineers Beneficial Association (MEBA) and the National Maritime Union (NMU) do not represent the same type of employees. MEBA repre-

sents only licensed marine engineers whereas NMU represents unlicensed seamen. Neither can encroach upon the other's jurisdiction under their charters from the AFL-CIO. Since NMU members and MEBA members do not perform the same work and do not compete for the same jobs, under no circumstances could a dispute between them be considered a jurisdictional dispute. *NLRB vs. Radio Engineers Union,* 364 U. S. 573 (1961).

It is similarly clear that the MEBA and the Seafarers International Union (SIU), which represents unlicensed seamen, are not affiliated unions. In fact, a statement by the Court of Appeals for the District of Columbia Circuit that they were affiliated (Petition, p. 43, footnote 1) brought forth a loud storm of protest from MEBA counsel (see letter from David Scribner, Esq. printed as Appendix A to this Reply Brief). The District of Columbia Court of Appeals' confusion of SIU with MEBA was the result of certain gratuitous comments by counsel for the Board—comments which were completely without foundation in the record as SIU was in no way involved in the picketing and was not claiming any jobs on the *Maximus.* When this error was called to the Court's attention, it immediately filed an amended opinion (Petition, p. 59).

However, despite the clearly established fact that NMU and MEBA were not competing for the same jobs, as well as the indisputable fact that the SIU was in no way involved in the dispute, the Board in its Brief continues to advance the erroneous proposition that SIU is somehow involved. Thus, it begins its Statement of the Case as follows:

> "The present cases arise out of a dispute concerning representation of employees of the S.S. *"Maximus"* between the Marine Engineers Beneficial Association (MEBA) and the Seafarers Inter-

national Union (SIU) on the one hand and the National Maritime Union (NMU), petitioners here, and its affiliate, the Brotherhood of Marine Officers (BMO), on the other." (Brief in Opposition, p. 2).

THIS STATEMENT SIMPLY IS NOT TRUE. There is no evidence in the record to support it, the Board made no such finding, and counsel's constant repetition of this erroneous statement serves only to mislead and to confuse the issues. So that there will be no confusion on this point, and at the risk of being redundant, we can only repeat:

1. This case does not involve a dispute over representation as NMU and MEBA do not represent the same type of employees.

2. This case does not involve a jurisdictional dispute as NMU and MEBA members do not compete for the same jobs.

Since there was no controversy over representation, no controversy over jurisdiction, and, as the Board itself concedes, no controversy over "terms or conditions of employment," there was no "labor dispute" as defined in Section 2(9) of the Act. Accordingly, the Board was without jurisdiction and on this basis alone, the decision below should be reversed.

Respectfully submitted,

ABRAHAM E. FREEDMAN
Counsel for Petitioner

## APPENDIX A.

### Letter from David Scribner, Esq.

Law Offices

PRESSMAN & SCRIBNER

April 29, 1965

Mr. OGDEN W. FIELDS, Executive Secretary
National Labor Relations Board
1717 Pennsylvania Avenue, N. W.
Washington 25, D. C.

Re: National Maritime Union of America *v.* National Labor Relations Board (D.C. Cir. No. 18,789 dec. April 17, 1965).

Dear Sir:

We have just read the opinion of the District of Columbia Circuit as reported in 51 CCH Lab. Cas. Para. 19,637. National Marine Engineers Beneficial Association AFL-CIO, which we represent, was, as you know, not a party to that proceeding. We note a serious error of fact in the opinion of that court.

In Footnote 1 the Court states as follows:

> "The employees in question appear to be marine engineroom officer personnel, and the union organizations immediately involved are the Marine Engineers Beneficial Association, an affiliate of SIU, and the Brotherhood of Marine Officers, an affiliate of NMU. For convenience, we refer throughout to the parent unions."

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We also note that in referring to the picket signs the Court refers to the legend on the picket signs as follows:

*Appendix A.*

> "Information picketing, MEBA [SIU] Engineers interfere with employers lawfully recognizing NMU."

In purporting to quote a statement made by an NMU agent the opinion of the Court refers to the statement as follows:

> "We want you to be good and mad . . . I want you to call Paul Hall [the International President of SIU] and tell him to call off the MEBA [SIU] pickets on the Maximus."

It must first be noted that the bracketed reference to "SIU" in the legend on the picket sign as set forth by the Court did not actually appear on the legend.

The insertion of the bracketed "SIU" in the Court's quotation of the NMU agent's statement referred to above likewise did not appear to be part of the actual statement made by the agent.

The Court's statement in Footnote 1 referred to above is inaccurate and could not possibly be based on any record before the Court since it is an undeniable fact, and one of public record, that National Marine Engineers Beneficial Association is not an affiliate of the Seamen's International Union (SIU) but is an independent national union affiliated with the AFL-CIO. It would appear that because of the initial error made by the Court in this footnote the bracketed material referred to above was inserted.

We have read the decision and order of the Board (which was the subject of review by the District of Columbia Circuit), as reported in 1964 CCH National Labor Relations Board Para. 13,277, and we find nothing there which would support the mistaken reference by the Court that MEBA is an affiliate of SIU.

While we have not as yet had an opportunity to see the record before the Board in this matter we would venture to

say that there could be nothing in that record which would establish the existence of such affiliation.

The error made by the Court in this matter is of such a serious nature as it affects the MEBA that it warrants immediate action by the Board to have the error corrected, particularly since the Board as a public agency of the United States cannot permit the perpetuation of a serious error of which it has been made aware.

We sincerely trust that immediate steps will be taken to cause the error to be corrected. We would appreciate hearing from you as to what action the Board will take in this matter.

Sincerely,

DAVID SCRIBNER

DS/sb

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965.

No. 403.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

*Petitioner,*

*against*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

## REPLY TO BRIEF IN OPPOSITION.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

No. 403.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Petitioner

*against*

NATIONAL LABOR RELATIONS BOARD,
Respondent

## REPLY TO BRIEF IN OPPOSITION.

The Board, in its Brief in Opposition in the instant case (as it did in the Brief in Opposition in the companion case, *National Maritime Union of America* v. *NLRB*, No. 334, this Term, which arises out of the NMU picketing in Philadelphia, Houston and Galveston), has continued to advance the false proposition that the Seafarers International Union (SIU) is somehow involved in this controversy. This effort to bring in SIU, which is not supported by any evidence or by any finding by the Board, obviously is motivated by a desire to overcome the fatal deficiency in the Board's jurisdiction arising from the lack of a "labor dispute" by attempting to bring the NMU picketing within the framework of jurisdictional or representational picketing. It is a sufficient answer to this contention that the charges which were filed did not suggest that there was any jurisdictional or representational question involved nor were they filed under the sections of the Act dealing with

such controversies.[1] Moreover, since NMU and MEBA do not represent the same type of employees and do not compete for the same jobs, the instant picketing could not possibly be considered jurisdictional or representational. See *NLRB* v. *Radio Engineers Union*, 364 U. S. 573 (1961) and discussion in Reply to Brief in Opposition in *National Maritime Union of America* vs. *NLRB*, No. 334, this Term.

If SIU which, like NMU, represents unlicensed seamen, had been involved, then, conceivably, both the picketing of the *Maximus* and the instant picketing might be considered jurisdictional or representational. However, had it been SIU rather than MEBA that was picketing the *Maximus*, this dispute never would have arisen for, SIU being a union representing non-supervisory personnel, the Board would have had jurisdiction to enjoin it from illegally picketing the vessel. This distinction lies at the heart of this controversy and is of the utmost importance. Cambridge Carriers, Inc., owner of the *Maximus*, in an effort to stop the MEBA picketing, filed unfair labor practice charges against MEBA. These charges were dismissed by the Board on the ground that it lacked jurisdiction over MEBA as it was a union representing supervisory personnel.[2] However, if SIU had been involved in any way, as the Board now contends, the alleged supervisory status would not have been a defense, and the Board would have had jurisdiction to issue a complaint. Thus, the Board's current effort to frame the NMU picketing in terms of a

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[1] Jurisdictional and representational disputes are treated separately in Sections 8(b)(4)(i)(ii)(C) and (D), 29 U. S. C. A. 158(b)(4)(i)(ii)(C) and (D), and Section 8(b)(7), 29 U. S. C. A. 158(b)(7), of the Act.

[2] Section 2(3), 29 U. S. C. A. 2(3), excludes from the definition of "employee" as used in the Act "any individual employed as a supervisor."

jurisdictional or representational dispute with SIU flies in the face of its prior determination that it lacked jurisdiction to stop the picketing of the *Maximus*. It is the Board's inability to protect a union which is the victim of illegal picketing by a supervisors union which necessitated the NMU picketing in this case, and it is precisely because of this factor—that the dispute was with another union rather than with a primary employer—that such picketing is not proscribed by Section 8(b)(4)(i)(ii)(B) of the Act.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
Counsel for Petitioner.

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OCTOBER TERM, 1965.

**Nos. 334 and 403.**

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

*Petitioner,*

*v.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

## PETITION FOR REHEARING AND RECONSIDERATION OF ORDER DENYING THE PETITIONS FOR WRIT OF CERTIORARI.

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Respondent.

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## PETITION FOR REHEARING AND RECONSIDERATION OF ORDER DENYING THE PETITIONS FOR WRIT OF CERTIORARI.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, respectfully shows to this Honorable Court, as follows:

Petitioner earnestly submits that the two issues involved in these cases as resolved by the courts below are of such magnitude and importance that they will dramatically change the entire labor law of the United States and so extend the jurisdiction of the Labor Board as to control all activities of labor unions in their social, political, scientific and other collateral efforts, apart from those relating to terms and conditions of employment between the unions and *primary* employers.

The National Labor Relations Act, prior to the decisions in the instant cases, restricted the jurisdiction of the Labor Board to cases involving *"labor disputes"*. The NLRA, Section 2(9), defines a labor dispute: "The term labor dispute includes any controversy concerning *terms, tenure* or *conditions of employment,* or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment regardless of whether the disputants stand in the proximate relation of employer and employee." (Emphasis supplied.)

Chief Judge Sobeloff, speaking for the Fourth Circuit Court of Appeals in the *"Tulse Hill"* case (*NLRB* v. *International Longshoremen's Association*), 332 F. 2d 992 (1964), said: "The Act has been interpreted as conferring Board jurisdiction over a variety of labor matters, but there can be no jurisdiction where the complaint presents a controversy unrelated to the resolution of a 'labor dispute' as defined. We think that is the case here." In that case, the International Longshoremen's Association had withheld labor from a vessel which had been trading with Cuba. The opinion of Judge Sobeloff makes it crystal clear that the Labor Board is without authority to control the activities of unions and of union members in exercising their political beliefs, such as protesting communist activities, unless a labor dispute as defined in the Act is involved.

In the instant case, a supervisors' union (MEBA), which is exempt from the NLRA, picketed and immobilized the S/S *"Maximus"*. The NMU, which was not involved in the dispute but which represented the unlicensed seamen on the *"Maximus"*, was directly affected because it was in danger of losing all its jobs on the vessel as a result of the supervisors' picketing. In order to break the stranglehold of the exempt supervisor's union and protect

the jobs of its members on the *"Maximus"*, NMU began to picket the supervisors on other vessels where they could be found. Clearly, there is no labor dispute involved here, and, under the *"Tulse Hill"* decision the Labor Board was utterly without authority to exercise jurisdiction. In affirming the Board, the District of Columbia and the Second Circuit Court of Appeals expressly refused to follow the Fourth Circuit's decision of Judge Sobeloff in the *"Tulse Hill"* case. Upon this ground alone, this Court should grant certiorari. To leave the decisions below intact is to give the Labor Board a blank check to exercise jurisdiction over unions, far beyond anything that Congress intended. If the Board could exercise jurisdiction to make the longshoremen load a Communist vessel, then the Board can also penalize a union for refusing to do business with the Ku Klux Klan or with the Daughters of the American Revolution. In other words, so long as employees band together and become known as a labor union, then everything that they do is subject to the jurisdiction and review of the Labor Board. Nothing could be more contrary to the express language of the Labor Act and the intention of the Congress. Yet, unless this Court grants certiorari, the Labor Board will already have embarked on that program in the instant cases. Apart from the constitutional rights which are submerged in this tidal wave, the Labor Board now assumes the role of a potentate with the right of review and control over all phases of union activity.

The second point at issue in these cases is that the secondary boycott provisions of the NLRA apply only where there is a primary employer involved.

The Courts below and the Labor Board ruled that no primary employer was necessary to a secondary boycott charge. The late revered Judge Learned Hand, in *Douds v. International Longshoremen's Association*, 224 F. 2d

455, speaking for the Second Circuit, squarely held that a primary employer is an indispensible element to a secondary boycott charge. This holding is fully supported by the legislative history which is set out in our petitions for certiorari.

Moreover, the lower courts' holding on this point runs counter to the constitutional free speech rights as clearly stated by this Court in *NLRB* v. *Fruit and Vegetable Packers*, 337 U. S. 58.

We are fully conscious of the great burdens incident to the granting of petitions for certiorari, and, particularly, to the even greater burden in the granting of petitions for rehearing after certiorari has been denied, as here. However, petitions for rehearing were designed by this Court to afford an opportunity for reconsideration in those cases where a petitioner may not have brought the issues into proper focus, or where petitioner may not have adequately analyzed the issues. We respectfully suggest that these cases fall into those categories.

The principles here involved affect not only the 50,000 member NMU, petitioner herein, but necessarily extend to and will profoundy affect every union in the country and their millions of members.

The decisions below are in direct conflict with the well-reasoned decisions of two of the greatest and most respected judges in the Federal system, Judge Simon Sobeloff in the *"Tulse Hill"* case, and Judge Learned Hand in *Douds* v. *ILA*.

The granting of certiorari in these cases is of the greatest urgency, if labor's rights are not to be washed down the drain.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
Counsel for Petitioner.

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to the favorable consideration of this Court, and is not filed for the purpose of delay.

Abraham E. Kubie

Counsel for Petitioner.

END